IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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_____ Term, 1978

No. 77-1362.

Ve-Ri-Tas, Inc. and Pat Walker's of Colorado, Inc.,

Petitioners,

v.

Advertising Review Council of Metropolitan Denver, Inc.; Rocky Mountain Better Business Bureau, Inc.; Advertising Club of Denver; W. Dan Bell; William L. Cook; Jerry Gart; Willa Brown; Robert E. Jordan; Galen E. Broyles; Marilyn Massey; Gordon R. Yates; Albert Fay Hill; Celestino G. Mendez; Jean Larson; Roy L. Jansen; Don Puffer and George Truesdell,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Jurisdictional Statement

Petitioners, Ve-Ri-Tas, Inc. and Pat Walker's of Colorado, Inc., respectfully pray that a Writ of Certiorari

be issued to review the Judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered December 28, 1977 1977, affirming the decision of the Federal District Court for the District of Colorado's dismissal of petitioners' Complaint for damages and injunctive relief.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 567 F.2d 963
and is attached hereto as Appendix "A". The Order of the Federal District Court for the District of Colorado dismissing petitioners' Complaint is reported at 411 F. Supp. 1012,
was entered on April 7, 1976,
and appears here as Appendix "B".

Jurisdiction

The date of the judgment sought to be reviewed is December 28, 1977
The jurisdiction of this Court is invoked

under 28 U.S.C. §1254(1).

Questions Presented

1. Where the defendant organizations and governmental agencies systematically exchange information, and refer matters concerning deceptive advertising, to each other, and where, by reason of this continuing practice between the defendants and governmental agencies, the defendants have the obvious ability to trigger official responses to defendants' complaints, have defendants acted under color of "state action" and in violation of 42 U.S.C. §1983, where defendants utilized their unique relationship with governmental agencies to threaten advertisers such as plaintiffs with criminal prosecution unless advertisers such as plaintiffs (1) agree to submit themselves to the jurisdiction of defendants' self-appointed advertising review panels and (2) agree to abide fully with any decision of such panels, regardless of whether or not the panel's

hearings comport with basic and fundamental due process?

2. Where defendants have established advertising review panels designed to coerce nonmembers of defendants' organizations to comply with defendants' subjective and unbridled determinations of "truthfulness" and "ethics", and where such panels were established for the express purpose of obviating the necessity of governmental regulation of advertising practices, are defendants exercising a "public function" thereby acting under color of "state action" in violation of 42 U.S.C. §1983, when defendants use potent threats of criminal prosecution unless advertisers such as plaintiffs (1) agree to submit themselves to the jurisdiction of defendants' self-appointed advertising review panels and (2) agree to abide fully with any decision of such panels, regardless of whether or not the panel's hearings comport with basic and fundamental due process?

3. Where defendants act under color of "state action" to coerce advertisers such as plaintiffs (1) to agree to submit themselves to the jurisdiction of the defendants' self-appointed advertising review panels and (2) to agree to abide fully with any decision of such panels, regardless of whether or not the panel's hearings comport with basic and fundamental due process, have defendants deprived plaintiffs and other advertisers of their rights, privileges, or immunities secured by the First Amendment, Fifth Amendment, and Fourteenth Amendment to the United States Constitution?

4. Where defendants, consisting of, among others, a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humiliated by defendants' press releases and only nonmembers of defendants' organizations will be

recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a per se violation of Section 1 of the Sherman Act, 15 U.S.C. §1, as plainly prohibited by the Supreme Court in Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703 (1941)?

5. Where defendants, consisting of, among others,a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humuliated by defendants' press releases and only nonmembers of defendants' organizations will be recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a violation of Section 1 of the Sherman Act, 15 U.S.C. §1, under the "rule

of reason"?

6. Where defendants, consisting of, among others, a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humuliated by defendants' press released and only nonmembers of defendants' organization will be recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a violation of Section 2 of the Sherman Act, 15 U.S.C. §2 by combining with other person or persons to monopolize any part of trade or commerce among the several states?

7. Where defendants' activities erect a provincial and local barrier to the dissemination of interstate media advertising through the application by defendants

of vague, overbroad and ambiguous advertising "standards" to advertising appearing in Denver, Colorado, have defendants unduly burdened, interfered with and impeded the free flow of interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves the following constitutional provisions:

First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, . . ."

Fifth Amendment

"No person . . . shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Fourteenth Amendment

"No State. . . shall . . . deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, §8, Clause 3

"The Congress shall have power . . . to regulate commerce . . . among the several States . . ."

This case involves the following statutory provisions:

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1343(3) and (4)

"The district courts have original jurisdiction in any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, provilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

15 U.S.C. §1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

15 U.S.C. §2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .."

15 U.S.C. §15

"That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case

This Petition seeks review of the decision of the United States Court

of Appeals for the Tenth Circuit which affirmed the decision below of the District Court for the District of Colorado, granting summary judgment to defendants on each of plaintiffs' causes of action.

1. Identification of The Parties. Petitioner Ve-Ri-Tas, Inc. (hereinafter referred to as "Ve-Ri-Tas") was and is at all times relevant hereto a California corporation doing business under the fictitious firm and style name of Pat Walker's International Figure Perfection Salons. Petitioner Pat Walker's of Colorado, Inc. (hereinafter referred to as "Pat Walker's) is and was at all times relevant hereto a Colorado corporation, which did business in Englewood, Colorado, operating a figure perfection salon until late 1974.

Defendants Rocky Mountain Better Business Bureau, Inc., Advertising Review Council of Metropolitan Denver, Inc. and Advertising Club of Denver

(hereinafter referred to as "RMBBB", "ARC", and "Ad Club", respectively) are and at all times relevant hereto were Colorado nonprofit corporations with substantially overlapping memberships. Defendant Bell was General Manager and a director of RMBBB, and a director of ARC. Defendant Cook was President and a director of ARC and a business member of RMBBB. Defendant Gart was Vice-President and a director of ARC, and a business member of RMBBB. Defendant Brown was the Secretary and a director of ARC, and the Executive Director of Ad Club. Brown also participated in the affairs of RMBBB as the representative of Ad Club, a member of RMBBB. Defendant Jordan was Treasurer and a director of ARC and a business member of RMBBB. Defendant Broyles was a director of ARC and a member of Ad Club. Defendants Massey and Yates were directors of ARC and members of Ad Club. In addition, Massey and Yates participated in the affairs of RMBBB as

representatives of May D & F Company and Tallant/Yates Advertising, respectively. Defendant Hill was a director of RMBBB and Chairman of the Advertising Review Board of Metropolitan Denver (hereinafter referred as "ARB"), a subsidiary organization created and maintained by ARC.

As Chairman of ARB, defendant Hill supervised the activities of approximately 30 individuals, who, under guidelines created by the National Council of Better Business Bureaus ("CBBB"), conducted "hearings" in panels of five persons each to determine whether advertising of certain businesses suspected of false advertising by the RMBBB violated the RMBBB's Code of Advertising.

Defendants Mendez, Larson, Jansen, Puffer and Truesdell were the five members of the ARB panel assigned to conduct a "hearing" on the RMBBB charges against petitioners' advertising. Mendez, Larson, Jansen, and Truesdell were

members of RMBBB at the time they served on the ARB panel conducting the "hearing" on petitioners' advertising.

RMBBB's membership includes 800 of the most prominent business enterprises in metropolitan Denver, including, three of Denver's four television stations, the Denver Post and the Rocky Mountain News, radio stations, the Ad Club, major advertising agencies, Denver Banks, insurance companies, leading retailers and manufacturers, businesses and enterprises in health related fields, including doctors, and retailers of sporting goods, exercise and weight loss equipment, in competition with petitioners.

2. RMBBB's Relationship With State and Federal Agencies. For many years, there has existed an ongoing interchange of information and cross references of particular complaints by and between RMBBB and the offices of the Colorado Attorney General and the Denver District

Attorney. In fact, the record demonstrates that RMBBB was an informal screening service for the Colorado Attorney General and the Denver District Attorney. A 1974 survey, conducted by the University of Denver College of Business Administration, demonstrated that Denver area adults believed the RMBBB was an official arm of the government. One RMBBB employee testified that consumers calling the RMBBB "have the idea that the Bureau is funded through the government somehow". As an index of the Denver public's belief that the RMBBB was an official government agency, in 1973 alone, Denver consumers brought 19,1975 complaints against Denver area businesses to the RMBBB, and not to governmental agencies, for resolution. This compares with 7,200 complaints filed by Denver consumers in the year 1974-1975 with the Metropolitan Denver District Attorney's Office.

A congressional study of Better Business Bureaus around the country demonstrated that most consumers go only to Better Business Bureaus and do not further pursue available legal remedies. That congressional study also reported consumers' belief that their local bureaus were arms of government agencies.

The record reflects that RMBBB systematically prepares and delivers on request to governmental enforcement officials all information it has gathered from its investigation of complaints against nonmember businesses. RMBBB receives and uses in its investigations and publications published and unpublished information it has obtained from local state and federal law enforcement officials with whom the RMBBB has a special relationship. At the specific request of State law enforcement officials, RMBBB has conducted"shoppings" of nonmember businesses using RMBBB funds and personnel for such investigations.

The Denver District Attorney's Office refers to RMBBB consumer complaints against businesses for alleged deceptive advertising and business practices, where the Denver District Attorney is unable, because of limited personnel, to handle such matters.

For many years, RMBBB has issued numerous press releases which have been published verbatim or in substance by local media, in which RMBBB publicizes its investigatory work for government, using language which infers to the public that the RMBBB can actually control governmental agencies and can actually cause governmental agencies to prosecute specific cases. Examples of such claims follow:

"Mediterranean Galleries . . . was finally stopped [from allegedly misrepresenting a 'sale'] after BBB presented a strong protest to District Attorney Tooley."

"At the request of the Colorado Attorney General's Office of Consumer

Affairs, all evidence obtained by BBB in its shoppings [of Colorado Electronics Company] has been placed with that office."

"BBB files gave an assist to SEC in its action against David Eugene Duncan . . . recently convicted of criminal contempt for violating a court injunction . . . ."

"BBB investigation led to conviction and penitentiary sentences for . . . FHA violations."

"BBB investigation and information given to Federal Trade Commission in 1970 led to issuance of Cease and Desist Order against . . . ."

"Thirty one business firms in the Denver area have been warned by the Better Business Bureau that any future complaints [RMBBB] receives on any of the companies will be referred to a government agency for appropriate action. . . . W. Dan Bell, Bureau President, said that business firms who establish a pattern of

no response to consumer grievances or who consistently give 'mickey mouse' replies will be turned in to the Federal Trade Commission, State Attorney General or other governmental agency without waiting for the two-week period normally given to the companies to reply. BBB will actively assist in prosecution of such firms in any way that it can, he said."

3. Formation of ARC and ARB. Following guidelines suggested by the national CBBB, the RMBBB and Ad Club created ARC in February, 1974. A "kick-off"news conference, widely reported by Denver media, was attended by the Colorado Attorney General, the Denver District Attorney, the Colorado Secretary of State and the Director of the Metropolitan District Attorney's Consumer Affairs Office, all of whom gave public recognition, praise and verbal support to the formation of ARC.

In accordance with the national CBBB's guidelines, the ABC board of directors selected 32 individuals, most of whom were individuals belonging to RMBBB and/or Ad Club, to constitute a "pool" from which panels of five would be drawn by the ARB Chairman to hear cases against advertisers brought to the ARB by the RMBBB. The purpose of the RMBBB in placing cases before the ARB was to utilize the ARB process to gain additional "leverage" against noncomplying non-member companies.

4. After Formation of ARC and ARB. Following the formation of ARC and its subsidiary ARB panels, the RMBBB activities underwent a subtle but important change. As before RMBBB received complaints from the public and complaints referred to it from the office of the Colorado Attorney General and the Denver District Attorney. If the business complained against was an RMBBB member, the member could be expelled unless it complied with the

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RMBBB demands.

However, if the offender was a nonmember of the RMBBB, instead of its practice prior to the establishment of ARC and ARB of referring unresolved complaints against nonmember businesses to government officials, the RMBBB instead would present the unresolved complaint to one of the ARB panels. The referral to the ARB panels of unresolved complaints against nonmember businesses was accompanied by letters to the nonconforming businesses announcing the referral in a manner obviously intended to imply the proceedings were governmental or official in nature. The letter to the subject advertisers of referral, written on the imposing letterhead of the "Advertising Review Council of Metropolitan Denver, Inc." stated in part that:

"The mandate of the Advertising Review Board calls for making public the decision of its panel and all documents and data relevant to that position. The

Chairman of the Advertising Review Board is also to inform appropriate local and State government agencies of its decision."

Prior to commencement by your petitioners of their action in the District Court, RMBBB presented eight cases to the ARB, including petitioners', as "examples of cases the ARB panels would consider". Four of the cases involved businesses whose advertisements defendants Bell (Manager of RMBBB) and/or Hill (Chairman of ARB) personally believed to be false; misleading and inaccurate. These four cases, including petitioners', were not submitted at or prior to that time to government officials, even though Hill and/or Bell believed that the advertising might be unlawful.

5. <u>The Pat Walker's "Hearing"</u>. Other advertisers receiving the RMBBB notice of referral described above immediatly acquiesced to the RMBBB demands, even

though such advertisers believed that their commercial speech had been entirely proper and truthful. (National companies, faced with similar threats from the National ARB -- sponsored by the CBBB--that they will be publicly exposed and that National ARB's investigative files will be turned over to government agencies have similarly withdrawn advertising which the companies believed to be entirely truthful and proper). RMBBB documents were not turned over to government officials where the advertisers acquiesced to the RMBBB demands prior to the ARB panel hearing.

Upon receiving the ARB notice of referral, petitioners requested notice of the ARB procedures and of the RMBBB complaints. Counsel for petitioners attempted to explain to defendants the numerous constitutional imperfections of defendants' procedures. In reply, defendants insisted that their procedures were intended to accomplish an objective "so that

additional state and federal laws would not be required". Unsatisfied that due process could or would be accorded if petitioners submitted to the ARB panel hearing, petitioners refused to attend the panel hearing. The ARB panel announced their adverse findings to petitioners by letter, dated June 20, 1974. Thereafter, by letter dated July 16, 1974. defendants notified petitioners of their intention to make ARB's decision public and to make the records available to local or state agencies. This action was filed in July, 1974. The District Court refused to enjoin defendants' news release, and, on September 12, 1974, defendants announced to the media that "the Better Business Bureau found the Pat Walker people to be guilty of misleading advertisements." Defendants wrote the District Attorney's Office, enclosed a copy of the panel findings, and announced the availability of RMBBB files for government inspection. Thereafter, and for the

first time, an agent of the State of Colorado Metropolitan Denver District Attorney's Consumer Affairs Office requested and obtained the RMBBB file on petitioners. In early October, the District Attorney not having filed criminal charges against petitioners, defendant Hill wrote a "scalding letter" to the District Attorney, the substance of which was "why haven't you [the D.A.'s Office] filed on Pat Walker's." On October 11, 1974, the Denver District Attorney filed two misdemeanor counts of false and misleading statements against Pat Walker's, challenging the advertising claims which had been contested by the RMBBB in its presentation to the ARB. The documents relied upon by the District Attorney were almost exclusively those documents furnished by the RMBBB to the District Attorney's Office after the ARB announced their availability to the District Attorney. The list of witnesses supplied by the District Attorney were almost exclusively defendants

and their employees.

6. ARB "Due Process". (a) Contrary to their own written procedures, RMBBB presented evidence against petitioners at an ARB panel hearing without giving prior notice of such hearing to petitioners. (b) Contrary to ARB procedures, no transcript of oral testimony of witnesses before the ARB panel hearings was maintained by defendants. (c) By defendants' own standards, petitioners were given inadequate notice prior to the ARB panel hearings of the advertisements to be challenged by the RMBBB before the panel. (d) Four of the five ARB panelists were members of the RMBBB, despite the ARB guidelines that the panels were to be autonomous and independent of any and all other persons and organizations including sponsoring groups. (e) Defendants were uncertain whether ARB panelists had been present at both of the panel meetings at which RMBBB presentations against

petitioners were made. (f) Petitioners were first apprised of the standards which the ARB panel would apply in judging their advertisements three days after the panel hearing when the standards were enclosed with defendants' letter announcing the ARB panel's adverse ruling. (g) According to the District Court, the amorphous advertising standards applied by the ARB panel would violate the First Amendment, if they had been enforceable under color of "state action." (h) Contrary to ARB published guidelines, RMBBB failed to present either petitioners or the ARB panel with significant exculpatory evidence in the possession of RMBBB, including physicians' recommendations of petitioners' weight loss program; a physicians' corroborating report; and unbiased and voluntary customer testimonials. (i) Defendants failed to inform petitioners that, under their own guidelines, the

local ARB lacked "jurisdiction" over the advertisements, since they were defined as "national" advertising to be referred to the national ARB. (j) As evidence against petitioners, RMBBB presented the ARB panel with an Illinois consent decree against a totally unrelated company and involving a totally unrelated weight loss program.

Reasons Why The Writ Should Be Granted

I

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS MISAPPLY AND CONFLICT WITH THE "STATE ACTION" TESTS ESTABLISHED BY THE SUPREME COURT AND HAVE SO FAR DEPARTED FROM THE PROPER APPLICATION OF SUCH TESTS AS TO REQUIRE THE SUPREME COURT'S SUPERVISION.

A. The decisions of the District Court and the Court of Appeals misapply

and ignore the "symbiotic relationship" state action test established by the Supreme Court in Gilmore v. City of Mortgomery, 417 U.S. 556, United States v. Price, 383 U.S. 787, Burton v. Wilmington Parking Authority, 365 U.S. 715, and the line of cases derived therefrom.

State involvement in private conduct is frequently "nonobvious" and requires the sifting of facts and weighing of circumstances. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (Clark J.). The facts and circumstances of this case revealed: (1) The ongoing exchange of information and cross-referral of consumer complaints by and between RMBBB and State governmental agencies; (2) The use by State governmental agencies of the RMBBB to conduct investigations for State governmental agencies, to screen consumer complaints for State governmental agencies and to supply State governmental agencies, with documentation and court witnesses

necessary to prosecute businesses who are nonmembers of RMBBB; (4) The public endorsement in February, 1974, by the State governmental agencies at a press conference, of the RMBBB and Ad Club's establishment of the ARC and ARB, which were in future to conduct hearings on cases brought to their attention by the RMBBB against nonmembers suspected of "deceptive" or "unethical" advertising practices; (5) After the establishment of the ARB and ARC by the RMBBB, nonmembers of RMBBB who were suspected of deceptive advertising practices would no longer be directly and immediately referred to the appropriate State governmental agencies, but instead, would receive threatening letters that ARB panels would hear their cases and, if found "guilty" by the ARB panels, that the advertisers would be publicly discredited in a press release and then (and only then) would the RMBBB files be made available to State governmental

officials for prosecution.

The District Court, in reviewing the above facts and circumstances, felt that the defendants were doing no more than commendable "self-regulation". The Court of Appeals took a more critical view of defendants' "self-regulation", since it was clear that the parties regulated by defendants were nonmembers exclusively. However, both the District Court and the Court of Appeals failed to recognize and accord its significance the extent to which State governmental agencies had become accomplices with and, in fact, the very backbone of the defendants' "self-regulation" procedures.

The Bureau had, for many years, deliberately advertised to the public its close relationship with State governmental agencies. The public believed that the RMBBB was in fact an arm of the government. The widely publicized endorsement of the State governmental agencies for the

defendants' ARC would only have augmented public belief that defendants were governmental. In endorsing the ARC plan, State governmental agencies knew or should have known that the "power source" behind the ARC and ARB proceedings would be the express threat to subjected businesses of RMBBB cooperation with government prosecution, in the event the businesses did not cooperate; and the implied promise, if such businesses did cooperate, that RMBBB files would be withheld from government agencies. The resolution of other ARB panel cases demonstrated the impact of those express and implied promises. The threat of reference to a public agency had, in the Court of Appeals' opinion, "the obvious ability to trigger some official response." As the Court of Appeals stated, "the record clearly shows that the [RMBBB] used its ability to cause some official reaction by its reference to the District Attorney."

The "nonobvious" but symbiotic relationship between the defendants' procedures and the State governmental agencies required a finding of "state action" in this case. Defendants derived their entire coercive powers from that precise symbiotic relationship with the government agencies. The cases of the Supreme Court clearly demonstrate that the participation of government agencies in private action need not be "deliberate" or "intentional". Even so, the facts in this case demonstrate the positive support of the State governmental agencies for the defendants' proposed procedures which relied upon the "clout" which the defendants' unique and special relationship with the governmental agencies could afford to them. The District Court and Court of Appeals misapplied and ignored the "symbiotic relationship" state action test laid out by this Court in the above-referenced cases, and improperly dismissed

petitioners' cause of action.

B. The District Court and Court of Appeals misapplied and ignored the Supreme Court's "public function" state action test as established by this Court in Marsh v. Alabama, 326 U.S. 501 (1946), and Hudgens v. NLRB, 424 U.S. 507 (1976).

Defendants believed that the advertising of petitioners, as well as the advertising of three other businesses, were untrue, deceptive, and misleading, and thus violative of Colorado state law. Instead of performing their duty as citizens to report potential violations of law, defendants referred the matter to their own vigilante ARB panel for decision. Reviewing the District Court, the Court of Appeals stated that "the facts show the activities and the relationships to closely approach the public function line, but do not cross it." The Court of Appeals failed to accord proper significance to the fact that defendants

self-admittedly were attempting to establish procedures to prevent the necessity of formal governmental action. Prior to the establishment of the ARC and ARB, unresolved RMBBB complaints against subject businesses were referred to the appropriate governmental agencies, where they became matters for official government action. After the establishment of the ARC and ARB, unresolved RMBBB complaints against nonmembers were not to be referred to government agencies, but were to be referred to the ARC and ARB for resolution through the coercive application of threats of governmental action. This revised procedure received the public endorsement of government agencies. The rationale of the "public function" doctrine applies with great vigor to the facts of this case:

"Private persons who possess power to significantly deprive a general community of rights protected by the Constitution against state infringement possess powers

equivalent to those of government. Such private persons and those exercising certain peculiarly governmental functions threaten these rights as effectively as government itself." "State Action: Theories for applying Constitutional Restrictions to Private Activity," 74 Col. L.Rev. 656, at 691 (1974).

Defendants understood themselves as undertaking a governmental role, in order to prevent official agencies from increasing their own enforcement activities. Unfortunately, defendants, in their rush to usurp governmental functions, trampled over the procedural and substantive due process rights of the nonconsenting businesses over which defendants asserted their self-righteous authority.

In 1926, a Massachusetts District Court was faced with facts similar to those involved herein. In American Mercury, Inc. v. Chase, 13 F.2d 224 (D. Mass. 1926),

an unofficial society organized by defendant Chase scrutinized publications to determine whether the books and magazines violated the law. If, in the society's opinion, the publication was unlawful, distributors were notified of the society's opinion "with the intimation, express or implied, that if the book or magazine be sold or distributed prosecution will follow. Where this warning is ignored, it is [the society's] custom to institute prosecutions." American Mercury, Id., at p.224. The Court enjoined the society with the following language:

"In my judgment, this is clearly illegal. The defendants have the right of every citizen to come to the courts with complaints of crime; but they have no right to impose their opinions on the book and magazine trade by threats of prosecution if their views are not accepted. [citations omitted]. The fact that the defendants are actuated by no commercial

motive and by no desire to injure the plaintiff do not enlarge their rights in this respect . . . .

"Of course, the distributors have the right to take advice as to whether publications which they sell violate the law, and to act on such advice, if they believe it to be sound. The defendants have the right to express their views as to the propriety or legality of a publication. But the defendants have not the right to enforce their views by organized threats, either open or covert, to the distributing trade to prosecute persons who disagree with them." American Mercury, Id. at p.225.

Under the facts and circumstances of this case, defendants have most clearly exercised a "public function" and have thereby deprived petitioners of First Amendment rights of commercial speech, freedom of disassociation, and substantive and procedural due process.

II

THE DISTRICT COURT IMPROPERLY HELD THAT DEFENDANTS' ACTIVITIES, CONDUCTED UNDER "STATE ACTION", DID NOT INFRINGE PETITIONERS' CONSTITUTIONAL RIGHTS.

In what appears as dictum in the District Court's opinion, and unreviewed by the Court of Appeals, the District Court stated that defendants had not infringed petitioners' constitutional rights. However, the District Court itself stated that the amorphous standards applied by the ARB panel to petitioners' advertising would be held violative of the First Amendment, by reason of vagueness, if they had been enforceable under "state action." The District Court apparently concluded that, since, in its view, defendants' activities were not infused with "state action", that any process accorded to petitioners by

defendants would be "due". However, defendants' nonobservance of their own written procedures, and the absence of commonly accorded procedures to which petitioners would be entitled in a criminal prosecution for deceptive advertising, bely the District's ruling.

III

DISTRICT COURT AND COURT OF APPEALS, IN FAILING TO FIND A PER SE VIOLATION OF THE SHERMAN ACT, HAVE DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, MOST NOTABLY, FASHION ORIGINATORS' GUILD OF AMERICA v, FEDERAL TRADE COMMISSION, 312 U.S. 457 (1941).

The rationale of Fashion Originators' applies decisively to the facts of this case. As here, in Fashion Originators, a trade association set up an elaborate system of trial and appellate tribunals for the purpose of determining whether a nonmember had pirated a member's dress design. Justice Black, in memorable language,criticized the association as;

". . . an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 at 707.

The association argued that its practices were "reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs . . . ." Id. at p.708.

However, Justice Black, speaking for the Court, replied that the reasonableness of the methods pursued by the combination to accomplish its unlawful object was immaterial.

". . . even if copying were an acknowledged tort under the law of every

state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." Id.

Other trade associations whose activities parallel those of the defendants herein have been held to have violated Section 1 of the Sherman Act. American Medical Association v. United States, 317 U.S. 519 (1943); Eastern States Lumber Dealers Asso. v. United States, 234 U.S. 600 (1914); United States v. Parke-Davis & Co., 362 U.S. 29 (1960); American Column & Lumber Co. v. United States, 275 U.S. 377 (1921); Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441 (1922); Radiant Burners v. People's Gas & Coke, 364 U.S. 656 (1961). See also, "Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act," 30 U. Chi. L.Rev. 171 at 179.

It is respectfully submitted that the District Court and Court of Appeals

have failed properly to apply the law of the Supreme Court as contained in the above-cited cases.

IV

THE DISTRICT COURT AND COURT OF APPEALS, BY FAILING TO OBSERVE THE SUPREME COURT'S TESTS OF "STATE ACTION", IMPROPERLY RULED THAT DEFENDANTS' ACTIVITIES WERE NOT AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court is referred to the argument hereinabove set forth, respecting the "state action" tests which were improperly applied or ignored by the District Court and Court of Appeals.

V

THE DECISIONS OF THE COURT OF APPEALS AND DISTRICT COURT PRESENT A NOVEL CIVIL RIGHTS RULING OF SUBSTANTIAL PUBLIC IMPORTANCE AND GRAVITY WHICH HAS ALREADY RECEIVED NATIONAL ATTENTION AND, IF PERMITTED TO STAND, WILL INVITE FURTHER INCURSIONS BY OSTENSIBLY PRIVATE GROUPS UPON THE DUE PROCESS AND FIRST AMENDMENT RIGHTS OF INTER-STATE BUSINESSES.

Defendants' ARC organization is only one of numerous local Advertising Review Councils established around the country in accordance with guidelines circulated by the Council of Better Business Bureaus ("CBBB"). In addition, the CBBB has, in association with the American Advertising Federation, the American Association of Advertising Agencies, and the Association

of National Advertisers, established a national advertising review council, whose procedures were substantially identical to those of defendants. Petitioners respectfully submit that the conduct and actions of defendants herein constitute a wanton and dangerous overstepping of private conduct into a realm of action which is governmental in nature, and which should be subject to constitutional safeguards and guarantees. Conduct of defendants, and similar groups around the nation, unless checked, will deprive individuals and businesses of free exercise of commercial speech and may counteract the work of this Supreme Court in bringing commercial speech under the protection of the First Amendment.

Conclusion

Petitioners pray that this Petition be granted.

Respectfully submitted,

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A P P E N D I X "A"

Filed
United States Court of
Appeals - Tenth Circuit
December 28, 1977
Howard K. Phillips,
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VE-RI-TAS, INC. and PAT WALKER'S OF COLORADO, INC.,

Appellants,

v.

ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC., et al.,

Appellees.

D.C. NO. 74-M-625

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

David S. Koslow, Los Angeles, California (Robert C. Hawley, Denver, Colorado, Harrison W. Hertzberg, Los Angeles, California; Ireland, Stapleton, Pryor & Holmes, Denver, Colorado, and Hertzberg, Kaplan & Koslow, Los Angeles, California, of Counsel, with him on the Brief), for Appellants.

Thomas Kelley, of Yegge, Hall & Evans, Denver, Colorado (John D. Phillips, Jr., Denver, Colorado, with him on the Brief), for Appellees.

Before Seth, Chief Judge, HOLLOWAY and BARRETT, Circuit Judges,

SETH, Chief Judge.

The plaintiffs asserted three separate claims based on violations of the Fourteenth Amendment, the antitrust laws, and in placing a burden on interstate commerce. The facts were fully developed during the course of extensive discovery, and both sides filed motions for summary judgment. The parties agreed that the record was complete. The trial court granted defendants' motion for summary judgment, and the plaintiffs appeal.

The plaintiffs assert that there was color of state law or state action as a consequence of a symbiotic relationship between the defendants and the governmental authorities as described in Gilmore v. City of Montgomery, 417 U.S. 556; United States v. Price, 383, U.S. 787; and Burton v. Wilmington Parking Authority, 365 U.S. 715. The

trial court concluded that defendants' acts were not under color of state law, and that there was no public function by them under 42 U.S.C. §1983.

The trial court found that defendants, the Colorado Attorney General, and the Denver District Attorney were all directing their efforts toward protection of the buying public. The record shows that the official agencies and the defendants were exchanging information, and were referring matters concerning deceptive advertising to each other. All were going in much the same direction, and their areas of interest and activity overlapped. The trial court found, however, that the complaint filed by the District Attorney against Pat Walker's of Colorado, Inc., was the result of the exercise of independent judgment of the prosecutor, and that alone.

The plaintiffs also assert that under Hudgens v. NLRB, 424 U.S. 507, the

defendants were performing a public function. This "public function" issue is a difficult one to resolve. The standards sought to be imposed by the defendants are those of public concern and regulation. As the trial court pointed out, the two functions overlap. The District Attorney refers complaints to the BBB, and it refers matters to the District Attorney, as mentioned above. It is not really "self-regulation." Appellees' brief states that there are some 20,000 businesses in the area and some 815 belong to the BBB. All of the 20,000 probably do not advertise, but the 815 are seeking to regulate primarily nonmembers. It is thus hard to tell who the "self" is.

Probably the most siginificant or revealing aspect of the BBB - District Attorney relationship is the fact that if a nonmember refuses to change the advertisements it has been running or to stop them, the matter is referred to the District Attorney.

This is advanced by the appellees as the exercise of their duty as a citizen, that is to report some misdeed. However, if this same nonmember had agreed to change the advertisements or to stop it in the face of appellees' threat, his misdeed would not be reported to the District Attorney. In each instance, the transgressions are the same, but only if the BBB is unable to accomplish the enforcement it seeks is the matter reported. This reporting or nonreporting takes much of the luster from the image of a "good citizen" reporting a transgression. The appellees in their brief take a similar inconsistent position when they treat the situation where the nonmember abides by the Board decision as a "moral issue," and when the nonmember refuses to agree, it is a matter of fraud.

This lends some credence to the "public function" argument. This is coupled with the threat of reference to a public agency

with the obvious ability to trigger some official response. It would seem to be a sufficient demonstration of its position to bring about some reaction from public law enforcement officials. This need not result in a formal charge. The District Attorney did not use the BBB, but the record clearly shows that the BBB used its ability to cause some official reaction by its reference to the District Attorney. Any good citizen can "demand" that charges be filed as did the letter of Mr. Hill as chairman of the ARB, but this was to demonstrate some clout where the position was not agreed to by the nonmembers. If there had been agreement there would not have been this good citizen letter. This is somewhat akin to selective enforcement.

All in all, we must say however that the facts show the activities and the relationships to closely approach the public function line, but do not cross it. The

evidence is sparse on the use of the BBB, and the related entities, by the law enforcement agencies. They react to submissions by the BBB, but obviously initiate their own investigations and procedures. The BBB clearly does not function as an arm of official enforcement. We thus hold that the test of a public function has not been met. Hudgens v. NLRB, 424 U.S. 507; Marsh v. Alabama, 326 U.S. 501.

We agree with the conclusion of the trial court that the defendants were not acting under color of state law.

We have considered the antitrust issue advanced by the appellants, and we fully agree with the analysis of the antitrust issue as made by the trial court, and nothing would be served by a further discussion in this opinion. There is no basis for the claim by reason of the divergent positions and interests of the various parties.

The other points of appellants have

been considered, but we find no merit in them.

AFFIRMED.

A P P E N D I X "B"

Filed
United States District Court
Denver, Colorado
April 7, 1976
James R. Manspeaker,
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 74-M-625

VE-RI-TAS, INC. and PAT WALKER'S OF COLORADO, INC.

Plaintiffs,

v.

ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC., et al.,

Defendants.

Mr. Harrison W. Hertzberg, 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010, and Ms. Gretchen VanderWerf of Ireland, Stapleton, Pryor & Holmes, P.C. 1700 Broadway, Denver, Colorado 80202, attorneys for the plaintiffs. Mr. John D. Phillips and Mr. Thomas B. Kelley of Yegge, Hall & Evans, 1340 Denver Club Building, Denver, Colorado 80202, attorneys for the defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This action was commenced by the filing of a complaint on July 17, 1974. An amended complaint was filed September 30, 1974. The parties engaged in extensive discovery and upon the facts developed, both plaintiffs and defendants have filed cross motions for summary judgment upon which a hearing was held. The issues are now presented for final disposition.

THE PARTIES

VE-RI-TAS, INC. is a California corporation doing business under the fictitious name and style of Pat Walker's Int'l. Figure Perfection Salons. Its principal place of business is in Los Angeles, California and it also has an office in Houston, Texas. The plaintiff Pat Walker's of Colorado, Inc., is a Colorado corporation which did business in Englewood,

Colorado operating a figure perfection salon until October 29, 1974.

Rocky Mountain Better Business Bureau (BBB) is a private, non-profit corporation organized under Colorado law. Its activities are funded by dues from its members, public donations and sales of literature to its members and to the public. BBB received no financial aid or assistance from the State of Colorado and its members include more than 800 business enterprises and approximately 100 consumers.

Advertising Club of Denver (Ad Club) is a non-profit Colorado corporation with members who are advertising agencies and persons engaged in the advertising business.

Advertising Review Council of Metropolitan Denver, Inc., (Ad Council) is a Colorado non-profit corporation which was organized to create and maintain the Advertising Review Board of Metropolitan Denver (ARB). The individual defendants

Bell, Cook, Gart, Brown, Jordan, Broyles, Massey and Yates are all directors of the Ad Council. Defendant Bell is also general manager and a director of BBB.

The defendant Hill is chairman of ARB which consists of thirty members who are available to serve on five member panels for the purpose of considering the truth and accuracy of specific advertising claims. The other individual defendants are the members of the panel concerned with Pat Walker's advertising. The composition of the ARB is to be forty per cent local advertisers, thirty per cent local advertising agencies and thirty per cent local public members and that same relationship is to be maintained on the individual panels.

UNCONTROVERTED FACTS

The essential facts are not in controversy. The business of VE-RI-TAS is the leasing of figure perfection machines

and equipment to salons in several states using a standard equipment rental agreement. These rental agreements and arrangements between VE-RI-TAS and the salons bear some resemblance to franchising agreements. For purposes of this case, it is not necessary to define the exact legal relationship between VE-RI-TAS and such businesses.

Pat Walker's of Colorado, Inc. had rental agreements for the use of fifteen of these weight reduction machines. VE-RI-TAS also assisted the salons, including Pat Walker's of Colorado, Inc., by giving counsel and advice with respect to marketing and advertising. VE-RI-TAS provided advertising slicks for use by the Colorado outlet as well as other salons.

Ad Council was incorporated in February, 1974 and a public announcement of its formation was made at a press conference on April 10, 1974, attended by the Colorado Attorney General, the

Denver District Attorney, the Colorado Secretary of State and the Director of the Metropolitan District Attorney's Consumer Affairs Office. These officials gave public recognition, praise and verbal support to what they described as an effort at self regulation by the business community.

The stated purpose of the ARB was the achievement of the highest standards of truth and accuracy in advertising through a system of self regulation.

BBB received complaints from the public. The staff of the office of the Colorado Attorney General and the Denver District Attorney also refer citizen complaints to the BBB. The BBB makes an effort to resolve the complaints by negotiation and agreement with the offending advertiser. If the offender is a BBB member, the sanction of explusion may be used. For purposes of these summary

judgment motions, it is assumed that the plaintiff could prove that in practice BBB members are treated differently from non-members with respect to advertising complaints against them.

On June 4, 1974, ARB chairman Hill wrote a letter to Pat Walker's of Colorado, Inc., to advise of the referral from BBB of a complaint regarding Pat Walker's advertising. In that letter the president of Pat Walker's was invited to appear and present testimony and argument before the panel and notice was given that the decision of the panel would be made public and that it would be given to appropriate local and state government agencies.

Plaintiffs' counsel requested all documents relative to ARB procedures, which were given to him before June 24. On that day, plaintiffs' counsel wrote to chairman Hill, raising procedural due

process objections and denying that ARB had any jurisdiction to consider any complaints against his clients.

On the morning of June 26, Pat Walker's of Colorado, Inc. received written notice of the specific advertising claims being questioned. On the afternoon of that day, plaintiffs' counsel met with chairman Hill to explain further the procedural due process objections to the procedure which ARB was following.

The panel did meet and conduct a hearing on the evening of June 27. There was no appearance for any one representing Pat Walker's of Colorado, Inc. BBB members attended and presented evidence which resulted in the panel determination that Pat Walker's ads violated the BBB Code of Advertising. These violations included the use of a testimonial made by the wife of the president of Pat Walker's, without disclosure of the fact

of that relationship. Claims of the effectiveness of weight reduction through the use of "passive exercise equipment" were also found to be misleading.

The occupations of the panel members in this case are a co lege teacher, a clerk of the Colorado Senate, the president of an appliance store, the director of a credit bureau and an advertising agency representative.

By a letter dated June 30, 1974, chairman Hill advised Pat Walker's of Colorado, Inc. that the panel meeting had been held and the specific charges and findings made were quoted in that letter. Chairman Hill requested that Pat Walker's cease the use of the offending advertising within a reasonable time and he asked to hear from Pat Walker's within ten days "regarding your 'acceptance, rejection or request for modification or reconsideration of the board's decision'".

There was no reply to that letter.

On July 16, defendant Hill wrote another letter to Pat Walker's of Colorado, Inc. to advise of ARB's intention to make the matter public and to make the records available to appropriate local or state agencies. In that letter, he also said that if Pat Walker's submitted a concise statement of its view, that statement would be published and released simultaneously with the ARB release.

As previously noted, this litigation began July 17, 1974 and the plaintiffs moved for a preliminary injunction against any news release. That motion was denied because it would have been a prior restraint of speech.

On September 12, 1974 chairman Hill held a news conference at which he released a statement that the ARB panel found Pat Walker's advertising to be misleading or unethical. He also

submitted this information to the Denver District Attorney and invited his examination of the BBB files.

The Denver District Attorney did file a criminal complaint against Pat Walker's of Colorado, Inc. on October 11, 1974, charging two counts of false and misleading statements in advertising. Such misdemeanors were alleged to have occurred on October 1, 1974 and October 8, 1974. Those charges were never brought to trial.

BBB is a dues paying member of the National Council of Better Business Bureaus. That organization supports and coordinates efforts of local Better Business Bureaus, including participation in the development of advertising review councils.

Upon these facts, the plaintiffs seek an injunction, declaratory relief and money damages under three separate

claims for relief. First, it is claimed that the defendants, acting under color of authority, violated the Fourteenth Amendment by infringing upon the plaintiffs' liberty and property rights without due process of law. Second, it is contended that the defendants violated the federal antitrust laws. Third, it is asserted that the defendants have placed an undue burden on interstate commerce. Jurisdiction to consider these claims is alleged to exist under 42 U.S.C. §1983, 28 U.S.C. §1343(3) and 1343(4), the Fourteenth Amendment, 15 U.S.C. §§15 and 26, and 28 U.S.C. §1337.

The material facts, disclosed by the extensive discovery record to be uncontroverted, show that the plaintiffs are not entitled to relief under any of these claims and that this civil action should be dismissed.

There can be no involvement of the Fourteenth Amendment and no cause of action under 42 U.S.C. §1983 if the defendants did not act under color of state law. It is the abuse of governmental authority which generates the right to relief. Because none of the defendants is an agency or official of government, the plaintiffs rely upon that line of authorities which finds the existence of state action where there is a showing of a symbiotic relationship with government. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), United States v. Price, 383 U.S. 787 (1966), Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

There is no touchstone by which to test the sufficiency of the nexus. The focus of the inquiry is whether the evidence shows that the state has elected to place its power, property and prestige behind the defendants' actions.

Gilmore v. City of Montgomery, supra.

Here the State of Colorado has exercised its police power by proscribing false and misleading statements in advertising with a criminal sanction. 1973 C.R.S. §18-5-301. Both the Colorado Attorney General and the Denver District Attorney assigned staff members to specialize in consumer protection matters. There has been considerable cooperation between those offices and the defendant corporations with an ongoing interchange of information and cross references of particular complaints. Such contribution to and cooperation with law enforcement is an exercise of constructive citizenship and the plaintiffs' briefs recognize the responsibility to relate information about criminal action to the proper governmental authority. The important involvement in this case is the extent to which state authority is the enforcement

mechanism for the standards of ethics and propriety established by the defendants. That, in turn, leads to the question of whether there is any indication of an infringement of constitutionally protected interests.

It is now clear that commercial speech is entitled to First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975). Accordingly, the plaintiffs had a right to advertise their products and services without a prior restraint or threat of governmental retaliation. Thus, if it were shown that the defendants were calling for some conformity with their notions of proper advertising content and that they had a call upon the power of prosecution to threaten criminal charges to enforce those views, there could be a basis for relief. That is not the case.

There is no question but that the BBB code of advertising is a private and

unofficial view of what commercial speech ought to be. There is also no question but that the State of Colorado can sanction false and misleading advertising through the criminal process without violating First Amendment freedoms. There is also a large area of coincidence as to what is criminal and what violates the unofficial code. The particular advertising statements involved in this case would seem to be within that area of coincidence.

There is nothing in this record to suggest that in the filing of the criminal complaint against Pat Walker's of Colorado, Inc. the Denver District Attorney's office acted in any way other than by the exercise of independent judgment that the information available, including that provided by the defendants, indicated the violations charged. There is nothing to show that these complaints were coerced by any of the defendants. It is clear that defendant

Hill and others sought to energize this prosecutive effort by calling attention to Pat Walker's advertising.

To put this case into proper context, recognition must be given to the defendants' freedom of speech. Those who call public attention to themselves or to their products and services through advertising must expect and anticipate that others will take issue with them. If the constitutional protection is to be given to commercial speech, it must be done with the same open exchange as we have long recognized for the free expression of ideas. What is presented in the record in this case is a well organized effort to use the power of publicity and peer group condemnation to establish a standard of responsibility in commercial communication. There is no imbalance of interests presented here. This kind of clash of claim and counterclaim is,

indeed, the engagement of conflicting interests which our constitutional system of ordered liberty is designed to protect. The traditional law of defamation is an adequate inhibition of any excesses attendant upon this type of activity.

The plaintiffs also claim that the color of law requirement is met in this case by a finding that the defendants, most particularly BBB, were performing a function which is public in nature and for which they have a fiduciary responsibility. Marsh v. Alabama, 326 U.S. 501 (1946) is cited as authority. There, the Supreme Court found that a private corporation was in the position of government in the operation of a company town. The rationale of that case has now been greatly restricted by the Supreme Court. Hudgens v. National Labor Relations Board, 44 U.S.L.W. 4281 (March 2, 1976).

There is no substitution of private for public authority in this case. The defendants are seeking to enforce the BBB advertising code. That is not the equivalent of any state statute or local ordinance. Indeed, if the standards set by that code were to be enacted into any law or regulation enforced by governmental action, it would be an infringement of First Amendment freedom. The advertising code can go beyond the limits of governmental action precisely because its enforcement mechanism is nothing more than a call of public attention to the offending conduct.

In summary, I conclude that the evidence reveals that the defendants here were not acting under color of law and, accordingly, there is no basis for relief under 42 U.S.C. §1983 or the Fourteenth Amendment.

Even if a contrary conclusion were

indicated by the evidence, the defendants' actions were consistent with applicable standards of due process. Whether the protected interests of the plaintiffs be considered in terms of the freedom of speech or the property rights involved in their business activities, the limitation of the sanction to adverse publicity could not conceivably call for more protection than that provided here. The criminal charges made against these plaintiffs have not been tried and the record does not disclose any reason for the failure to proceed with prosecution. No criminal sanctions have been imposed. The standard of what process is due for the retaliatory actions of the defendants is not to be confused with that required for criminal prosecution. Here the plaintiffs were given an opportunity to participate in a hearing and they were given an opportunity to participate in the formulation

of a public statement about the findings of the panel. Where, as here, the plaintiffs have made no effort to use the process available to them, they can hardly be claiming to be injured because not more was available.

The second claim for relief is for private enforcement of prohibited anti-trust activities. Under Section 4 of the Clayton Act, there can be private redress for such public wrongs if damage is shown. Here, the plaintiffs contend that there is a per se violation of Section 1 of the Sherman Act and an apparent attempt to monopolize in violation of Section 2 of that Act. More specifically, the plaintiffs contend that these defendants are engaged in a conspiracy among themselves and with the Council of Better Business Bureaus to restrain trade and commerce in the weight loss business within the greater Denver metropolitan area and to exclude

non-members of BBB from those markets. The claimed effect is the destruction of the business of Pat Walker's of Colorado, Inc. and an impairment of the business of VE-RI-TAS. Plaintiffs seek to bring their Section 1 charge within Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 (1941) where an association of dress manufacturers sought to combat style piracy by boycotting retailers who sold garments copied by non-guild manufacturers. That was held to be a group boycott which was a per se violation of Section 1 of the Sherman Act.

A comparable kind of violation was found in Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961). That involved a refusal to supply gas to consumers upon the basis of an alleged failure to comply with association standards of safety.

The obvious distinction between Fashion Guild, Radiant Burners and the present case is that here there is no refusal to deal and no concerted effort or attempt to boycott or to cause others to refuse to deal with the plaintiffs.

The plaintiffs have called attention to an FTC advisory memorandum refusing requested approval of an advertising review activity of the Better Business Bureau Pulaski County, Little Rock, Arkansas which was somewhat comparable to that involved in this case. The difference provides the distinction because the Pulaski County action involved an effort to persuade all advertising media to refuse to accept the offending material. No such effort is involved in what the defendants did here. If the antitrust laws were to be read so braodly as to preclude fair comment on the content of advertising material, they would infringe

upon the defendants' First Amendment freedom. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

Nothing in this record suggests any intent to monopolize by excluding the plaintiffs from the Denver market. Indeed, none of the defendants appears to be in competition with the plaintiffs in the weight loss market. It is too much to say that every sporting goods store is in competition with weight reduction salons simply because there is the sale of exercise equipment. While the two Denver metropolitan newspapers are members of BBB, there is nothing in the record to suggest that they acted in any way to inhibit advertising in their papers by the plaintiffs. The fact is that the advertising which was the subject of the criminal complaint was in October, 1974, much after

the June panel hearing and, indeed, after the commencement of this litigation.

The present case is quite comparable with McCann v. New York Stock Exchange, 107 F.2d 908 (2nd Cir. 1939), an action under the antitrust laws in which the plaintiff claimed that the New York Stock Exchange and New York Better Business Bureau had conspired to drive him out of business by publishing letters and leaflets describing him as "unreliable morally and financially, with a criminal record". There Judge Learned Hand said:

> . . .To be actionable the combination or agreement must be unlawful in means, or in end; the only unlawful means possible were the utterances about the plaintiff, the truth of which the judge did leave to the jury. The end avowed - - ridding the business of unscrupulous persons - - was not only lawful, but commendable, and while the defendants may have had other motives, that had to be proved and could not be assumed.
> (page 912)

There is no proof of such other motive in this case. Indeed, in my view the Pat Walker advertising was misleading because of its failure to tell the whole truth. The discovery record supports the characterizations and conclusions made by the defendants.

The third claim for relief fails because there is no jurisdiction in this court to grant private relief under the commerce clause of the Constitution. Clause 3 of Article 1, §8 of the United States Constitution is a limitation upon the power of the state. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) and Freeman v. Hewit, 329 U.S. 249 (1946). It does not create any implied cause of action and the defendants engaged in private activities, not state action. Cf. Chavez v. Freshpict Foods, Inc. 456 F.2d 890 (10th Cir. 1972); Skidmore v. Travelers Insurance Co., 356 F. Supp. 670

(E.D. La. 1973), aff'd. 483 F.2d 67.

Upon all of the foregoing, it is concluded that the plaintiffs have no claim for relief within the jurisdiction of this court and that a summary judgment should be entered for the defendants with a dismissal of this civil action. It is, therefore,

ORDERED that the complaint, amended complaint, and this civil action are dismissed and that judgment shall enter for the defendants with their costs to be taxed.

Dated at Denver, Colorado, this 7th day of April, 1976.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY

MAIL BY ATTORNEY

I, HARRISON W. HERTZBERG, ESQ. being first duly sworn, depose and state:

That I am and was at all times herein mentioned a citizen of the United States, employed in the County aforesaid, and over the age of 18 years; I further say that I am an active member of the State Bar of California, admitted to practice before the Supreme Court of the United States of California, a member of Hertzberg, Kaplan & Koslow, attorneys of record in this case, and am not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on March 24, 1978, I served the within PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California, 90010, addressed as follows:

John D. Phillips
YEGGE, HALL & EVANS
1340 Denver Club Bldg.
Denver, Colorado 80202

CLERK, UNITED STATES COURT
OF APPEALS - TENTH CIRCUIT
469 United States Courthouse
Denver, Colorado 80202

CLERK, UNITED STATES DISTRICT
COURT, DISTRICT OF COLORADO
United States Courthouse
Denver, Colorado 80202

HARRISON W. HERTZBERG

Subscribed and sworn to before
me this 24th day of March, 1978.

Mina Quezada

Notary Public in and for Said
County and State

Supreme Court, U. S.
FILED
APR 26 1978
MICHAEL RODAK, JR., CLERK

77-1362

IN THE SUPREME COURT OF THE UNITED STATES

VE-RI-TAS, INC. and PAT WALKER'S OF COLORADO, INC.,
Petitioners,

vs.

ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC.; ROCKY MOUNTAIN BETTER BUSINESS BUREAU, INC.; ADVERTISING CLUB OF DENVER; W. DAN BELL; WILLIAM L. COOK; JERRY GART; WILLA BROWN; ROBERT E. JORDAN; GALEN E. BROYLES; MARILYN MASSEY; GORDON R. YATES; ALBERT FAY HILL; CELESTINO G. MENDEZ; JEAN LARSON; ROY L. JANSEN; DON PUFFER; and GEORGE TRUESDELL,
Respondents.

BRIEF OF RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I.

INTRODUCTION

Because of the inability of the petitioners to posture this matter to fall within the considerations set forth in Rule 19 of the Rules of the Supreme Court of the United States, they have taken great liberty with the material facts which, to this point, the respondents did not believe were in controversy and which the Honorable Richard P. Matsch in his opinion at 411 F. Supp. 1012, 1014, 1016 (D. Colo. 1976) found as "uncontroverted facts" in granting respondents' motion for summary judgment. Furthermore, petitioners did not challenge any of the trial court's findings of fact in their appeal to the Tenth Circuit.

Also, the characterization by the petitioners, at p. 2 of their petition, of Judge Matsch's decision as simply

constituting a "dismissal of petitioners' Complaint for damages and injunctive relief" is incomplete, to say the least. As noted by Judge Matsch in granting respondents' motion for summary judgment at p. 1014 of 411 F. Supp.: "The parties engaged in extensive discovery and upon the facts developed, both plaintiffs and defendants have filed cross motions for summary judgment upon which a hearing was held. The issues are now presented for final disposition"; and as observed by the Tenth Circuit at p. 964 of 567 F.2d: "The facts were fully developed in the course of extensive discovery, and both sides filed motions for summary judgment. The parties agreed that the record was complete."

In their statement of the questions presented for review, petitioners arbitrarily characterize the questions

and the terms and circumstances set forth therein in a manner which has no foundation in the record. Petitioners actually argue their case in attempting to frame the questions.

Because of what respondents believe to be numerous inaccuracies and misleading statements by the petitioners in the facts and questions for review, respondents will set forth in detail their statement of the issues and facts.

II.

QUESTIONS PRESENTED FOR REVIEW

1. Was the trial court's conclusion (which was affirmed by the Tenth Circuit) that the respondents had no symbiotic relationship with government and accordingly were not acting under the color of state law correct in that:

(a) They had no call upon the power of prosecution to threaten criminal

charges to enforce their views with respect to advertising content; and

(b) The filing of a criminal complaint alleging false and misleading statements in its advertising against petitioner Walker's by the Denver District Attorney was the result of the exercise of the prosecutor's independent judgment and not the result of coercion by any of the respondents?

2. Was the trial court's conclusion that the respondents were not substituting private for public authority and were not performing a public function (which was affirmed by the Tenth Circuit on the basis that the Better Business Bureau clearly does not function as an arm of official enforcement), and were accordingly not acting under color of state law correct in that:

(a) The respondents seek only to enforce the Better Business Bureau's

private advertising code which is not the equivalent of any state statute or ordinance; and

(b) The respondents' enforcement mechanism is nothing more than a call of public attention to the offending conduct?

3. Was the trial court's conclusion correct that, assuming action under color of state law, the respondents' actions were consistent with applicable standards of due process in that:

(a) The only sanction available to respondents was the use of adverse publicity;

(b) The petitioners were given an opportunity to participate in a hearing and an opportunity to formulate a public statement about the findings of the reviewing panel; and

(c) The petitioners made no effort to use the process available to them?

4. Was the trial court's conclusion (which was affirmed by the Tenth Circuit) correct that Fashion Originators' Guild of America v. Federal Trade Commission is inapposite because, in this case, there is no refusal to deal and no concerted effort to attempt to boycott or cause others to refuse to deal with petitioners under Section 1 of the Sherman Act in that there is no effort to persuade advertising media to refuse to accept the advertising in question?

5. Was the trial court's conclusion (which was affirmed by the Tenth Circuit) correct that there was no violation of Section 2 of the Sherman Act in that:

(a) There was no intent to monopolize by excluding petitioners from

any Denver market;

(b) None of the respondents are in competition with Walker's in the weight loss market;

(c) Walker's advertising was not inhibited by the two major Denver metropolitan newspapers; and

(d) Walker's continued to advertise after the date of the press release as well as after the filing of the criminal charges?

6. Was the trial court's conclusion (which was affirmed by the Tenth Circuit) correct that it did not have jurisdiction to grant private relief under the Commerce Clause of the United States Constitution?

III.

STATEMENT OF THE CASE

Judge Matsch in his opinion at 411 F. Supp. 1013, 1014 (D. Colo. 1976) found, and the respondents so believe, that the essential facts are not in controversy. Those uncontroverted facts are set forth at pp. 1014-1016 of the opinion. They were not challenged by petitioners upon appeal to the Tenth Circuit, and petitioners did not directly take issue with the trial court's findings in their petition to this Court.

Notwithstanding, however, petitioners have been very loose in their presentation and characterization of the facts in their petition and have failed to inform this Court of the source for many of their statements,

which is a document[1] filed by them in the trial court and much of which is purely argumentative and rank hearsay. Accordingly, many of petitioners' statements do not reflect facts actually contained in the record, and many of the statements which purportedly set forth facts were not properly before the United States District Court under Rule 56(e) of the Federal Rules of Civil Procedure.

For the purposes of this response, respondents will point out initially a sample of those statements and characterizations which are misleading and distorted.

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[1]Entitled "Plaintiffs' Memorandum in Opposition to Defendants' Motions and in Support of Plaintiffs' Motions for Summary Judgment and to Strike the Defendants' Insufficient Defense," it consisted of 140 pages of argument, plus 130 exhibits and affidavits with 152 footnote references.

As one example of the extremes to which the petitioners have distorted the facts in order to attract this Court's attention, the petitioners at p. 15 of their petition claim that the membership of the respondent, Rocky Mountain Better Business Bureau, Inc. ("BBB"), includes, among others, "businesses and enterprises in health related fields, including doctors, and retailers of sporting goods, exercise and weight loss equipment, in competition with the petitioners." (Emphasis added.) The only suggestion by petitioners in the record below of competition with the business of petitioners, one of whom operated a purported weight reducing salon where ladies could lose weight without exercising, was a reference by petitioners to Gart Brothers Sporting Goods Company, of which respondent Gart is president, to the effect that, because that company

sells exercise equipment, it is in competition with the petitioners. This is somewhat strained. As noted by Judge Matsch at p. 1019 of 411 F. Supp.:

> "Indeed, none of the defendants appears to be in competition with the plaintiffs in the weight loss market. It is too much to say that every sporting goods store is in competition with weight reduction salons simply because there is the sale of exercise equipment."

The additional suggestion that any physician members of the BBB compete with petitioner Walker's is ludicrous.

Likewise, the offhanded characterization of the BBB as an "informal screening service for the Colorado Attorney General and the Denver District Attorney" at p. 16 of the petition is totally without foundation, as will be more fully discussed below.

The reference on the same page to a "1974 survey" conducted by the University of Denver College of Business Administration and which was not supported by

an affidavit from anyone is one example of many instances in which the petitioners base their arguments on sources which, being hearsay, are not properly in the record pursuant to Rule 56(e) of the Federal Rules of Civil Procedure.

The following, then, is respondents' statement of the case; it is essentially the same statement set forth in respondents' brief submitted to the Tenth Circuit, which brief contained extensive citations to the record. It can be reviewed by this Court, to the extent deemed necessary, to supplement the uncontested findings of fact set forth in the trial court's opinion below.

A.

Background

This action was commenced by the filing of a complaint on July 17, 1974.

The complaint alleges three claims. Count I alleges actions under color of state law and seeks redress under 42 U.S.C. § 1983 (1970). Count II alleges causes of action under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2 (1974)). Count III asserts a claim based upon U.S. CONST. art. I, § 8, the so-called "commerce clause."

The basis for Count I is 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress."

Petitioners allege that the respondents under color of state law have engaged in activities which deprived

them of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. In this regard, the petitioners' allegations in their complaint were that the BBB requested Pat Walker's of Colorado, Inc. ("Walker's") to discontinue or to modify advertising practices in violation of the "Advertising Code of American Business"; that upon Walker's refusal to comply the BBB filed a complaint with the Advertising Review Board ("ARB") of the Advertising Review Council of Metropolitan Denver, Inc. ("Council"); that the Council informed Walker's that, if after a hearing on the complaint by the ARB the finding was adverse to the advertiser and if it did not then discontinue or modify its advertising, the ARB would release a statement to the media and turn its files over to the law

enforcement authorities; that these acts tended to cause petitioners (and other advertisers) in the Denver area to submit to the demands of the BBB and result in the dominion, control and censorship of advertising by the BBB and restraint of competition; that the foregoing activities are solely and purely a governmental function; and that the standards and procedures employed by the BBB, the Council and the ARB denied petitioners procedural and substantive due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The facts alleged in the complaint as constituting a violation of Section 1 of the Sherman Act are as follows: the respondents entered into a conspiracy under the terms of which the BBB, the Council and the ARB would (1) attempt to

coerce local advertisers in the Denver area, through threats of public disparagement, into complying with the respondents' advertising standards; (2) conduct "trials" of advertisers refusing to comply; and (3) upon continued refusal to comply expose such advertisers to public disparagement resulting in "the threat of loss of business."

The effect of the conspiracy is alleged to be a suppression of competition through advertising among advertisers dealing in like products or services in the Denver area and to a deprivation of consumers of the opportunity to purchase those products at highly competitive prices. The acts of the respondents allegedly also cause a loss of revenues to "[petitioners] and other advertisers in the Denver area."

Petitioners also alleged that a monopoly in violation of Section 2 of the Sherman Act arises from the foregoing.

Walker's sought damages for loss of business and injunctive relief, while petitioner Ve-Ri-Tas, Inc. requested injunctive relief only.

Initially, petitioners sought a temporary restraining order and preliminary injunction prohibiting the issuance by one of the respondents of a press release criticizing the advertising practices of Walker's. After a hearing held on July 17, 1974, the same day the complaint and companion documents were filed, the United States District Court denied the petitioners' motions.

After the filing of motions by respondents directed at jurisdictional defects and failure to state claims in

the complaint, petitioners filed an amended complaint on or about September 30, 1974.

Respondents then renewed their motions as directed to the amended complaint.

Nevertheless, the parties engaged in extensive discovery; and, upon the facts developed, both petitioners and respondents filed cross-motions for summary judgment which were argued to the trial court on September 4, 1975. At the hearing, the parties agreed that the record was complete and that the issues were being presented for final disposition.

On April 7, 1976, the District Court entered its Memorandum Opinion and Order granting summary judgment in favor of respondents on all of petitioners' claims and dismissed the civil action.

B.

Plaintiffs

Petitioner Ve-Ri-Tas, Inc. ("Ve-Ri-Tas"), a California corporation with a manufacturing plant and offices in Los Angeles, California, leases figure perfection equipment in several states and also owns and operates two reducing salons in Houston, Texas.

Petitioner Walker's, a Colorado corporation, owns and operates a figure perfection salon in Denver, Colorado. Its customers come from the Denver metropolitan area, and, with rare exceptions, it has attracted no customers from the surrounding states of Wyoming, Nebraska, Kansas, New Mexico, or from any other states.

Walker's operated its salon with reducing machines leased from Ve-Ri-Tas under a standard form rental agreement

which provided for a down payment and a fixed monthly rental.

The standard rental agreements between Ve-Ri-Tas and Walker's were supplemented by letter to include a grant to Walker's of an exclusive territory and the right to use the name "Pat Walker's Figure Perfection Salon," and an undertaking by Ve-Ri-Tas to provide training of personnel, counseling, and "advertising slicks which it has available" to Walker's.

Ve-Ri-Tas did furnish to Walker's some training of personnel, some advertising supplies, a script for the reducing program, occasional parts and supplies, and several visits (at the lessee's expense) for public relations purposes by its national supervisor and its president.

No financial or operational advice was ever given by Ve-Ri-Tas to Walker's,

and Ve-Ri-Tas does not have access to its lessees' financial books and records, does not participate in the formulation of their budgets, does not participate in their marketing operations, and does not maintain controls on the lessees' operation or dictate to them how the salons should be run.

Ve-Ri-Tas did furnish advertising slicks produced by an independent advertising agency to Walker's without cost. The advertisements were prepared for salons owned by Ve-Ri-Tas, and Walker's then tailored the copy to its own needs.

Ve-Ri-Tas has no plants in Denver, no offices in Denver, owns no real estate or personalty in Denver, has no employees in Denver, sells no products in Denver, and purchases no goods or services in Denver. Ve-Ri-Tas does not

do any business in Denver, and it does not advertise in Denver.

C.

Defendants

Respondent BBB is a private non-profit corporation organized under the laws of the State of Colorado. It receives no financial or other type of assistance from the State of Colorado.

BBB is an organization of 815 businesses of different varieties and of approximately 100 consumers in the Denver metropolitan area. Business membership is predicated on having been in business for at least one year with a satisfactory complaint record. The BBB is funded by dues from its members, public donations, and sales of literature to the public. Members subscribe to a creed of truthful advertising.

The BBB monitors advertising in the local media and receives complaints from

consumers and others concerning deceptive sales and advertising practices in the local Denver metropolitan area. When a complaint is received, or a deceptive practice identified, the BBB attempts to mediate with the advertiser and bring about a voluntary correction of the objectionable practice. The BBB may "shop" the business in question and compile investigative data.

Members agree to be bound by the grievance procedures and, if a voluntary resolution is not reached, the BBB would refer a complaint against a member to its grievance committee. The grievance procedure involves a hearing by the grievance committee to consider the advertising practices under question. If an adverse determination is reached, a member may be expelled. Such hearings involving members averaged five per year; and, in September of 1974, the BBB

expelled six of its members and issued a news release announcing the expulsion.

Moreover, the BBB does refer problems concerning members' advertising to the district attorney.[2]

Nonmembers have a choice of the grievance procedure or an arbitration procedure.[3] Other than expulsion of a member, the procedures with respect to reviewing members' advertising and nonmembers' advertising are essentially the same.

Respondent Advertising Club of Denver ("Ad Club") is a private non-profit corporation incorporated under

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[2]The facts belie petitioners' protestations about members being treated differently than nonmembers.

[3]The petitioners erroneously state on p. 22 of their petition that, prior to the establishment of the Council, nonmember complaints were referred to government officials. Such is not the case; arbitration was frequently used, if the nonmembers would agree to arbitrate.

the laws of Colorado. Its membership consists of advertising agencies and persons in the advertising business, and it receives no financial or other type of assistance from the State of Colorado.

Respondent Advertising Review Council of Metropolitan Denver, Inc. ("Council") is a private nonprofit corporation which was incorporated in Colorado by Respondents Bell, Cook, Brown, Jordan, Yates, Massey, Gart and Broyles[4] on February 26, 1974, under the auspices of the BBB and the Ad Club. It receives no financial or other type of assistance from the State of Colorado.

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[4]Bell is general manager of the BBB. Cook is the chief executive officer of a furniture company. Jordan is an officer of Mountain States Bank. Brown is the executive director of the Ad Club. Gart is the president of a local retail sporting goods company. Massey is an advertising employee of a department store. Yates is an officer in an advertising agency business. Broyles, a former ad agency executive, is retired.

According to its Articles of Incorporation, the purpose of the Council is "to create and maintain the Advertising Review Board of Metropolitan Denver formed to sustain the highest standards of truth and accuracy in advertising through self regulation."

The Council promulgated a "Statement of Organization and Procedures" to govern the nomination and tenure of members of the ARB and the procedure by which panels selected from the ARB, under the direction of its chairman, would evaluate advertising claims presented for review under the standards of truth and accuracy. These are intended as ethical as opposed to legal standards, and the ARB deals only with questions of the truth or accuracy in the content advertising.

The ARB consists of at least 30 members, and the panels selected to

consider advertising claims are to consist of at least five of these persons. The composition of the ARB is required to be 40% local advertisers, 30% local advertising agencies, and 30% local public members.

The BBB is responsible for receiving or initiating complaints against advertisers and then evaluating, investigating, analyzing and holding initial negotiations with an advertiser on complaints or questions from any source involving the truth or accuracy of local or regional advertising. If an advertising matter cannot be satisfactorily resolved through the voluntary procedures employed by the BBB, then either the BBB, the advertiser, or the complainant may request review by the ARB.

Upon receipt of a request for review, the ARB chairman appoints a panel

of five members. The chairman informs all parties as to the identity of the panel members and mails copies of the request for review, and any responses thereto, to the panel members. Ten days' notice of any hearing or meeting to review the advertising is given to all parties of the date, place and procedure. All evidence and oral testimony to be introduced in any matter before the ARB is available for inspection at any time. Any interested parties may appear at the hearing and offer testimony, argument, or cross-examination.

The ARB notifies the advertiser in writing of its decision and the reasons therefor and, if adverse, requests modification or withdrawal of the advertising in question. The advertiser is given ten days to respond; failing such response, or modification of the advertising, the advertiser may be notified

that the matter will be made public and the records made available to appropriate local and state agencies and that it may submit, within five days, a concise statement of its views on the controversy, which also will be released by the ARB to the news media. The chairman may then inform the appropriate local or state governmental agency by letter of the ARB's decision that an advertisement is misleading and that the file is available for examination upon request.

The ratio of members on a given panel is required to be in the same ratio of membership as the full ARB. An advertiser member of the ARB is considered to be not qualified to serve on an individual panel if his employing company manufactures or sells a product or service which in the opinion and discretion of the chairman competes with the

product or service sold by the advertiser involved in the proceeding. An agency member of the ARB is considered as not qualified if his advertising agency represents a client that sells a product or service which competes with the product or service involved in the proceeding. An ARB member, including a non-industry member, shall be disqualified if for any reason arising out of past or present employment or association he cannot be expected to reach a completely unbiased decision. The chairman of the ARB has the responsibility to substitute new panel members if an original member has shown bias or conflict of interest.

Respondent Hill[5] is chairman of the ARB. Respondents Mendez, Larson, Jansen,

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[5]Hill is a minister and author.

Puffer and Truesdale[6] were members of the ARB panel selected to review the advertising of Walker's.

On April 10, 1974, the Council held a press conference at which the formation of the Council was announced. Present at the news conference were the Colorado Attorney General, one of his assistants, the Denver District Attorney, the Secretary of State of Colorado, and Felicia Muftic, Executive Director of the Metropolitan District Attorneys' Consumer Affairs Office. The Attorney General was reported as stating, "Honest self regulation is a superior thing to government regulation." Felicia Muftic was reported as saying she was "pleased

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[6]They include a college teacher, a clerk of the Senate of the State of Colorado, the president of an appliance store, the director of a credit bureau, and a representative of an advertising agency.

to see the Board formed." Other than these general endorsements and encouragements at the meeting, the Council and ARB have not received any endorsements from any state agencies.

D.

Walker's Advertisements

On May 23, 1974, at an organizational meeting of the ARB, the BBB presented the names of the advertisers and examples of advertising claims, including advertising by Walker's,[7] which would be the subject of the first set of complaints before the ARB. Chairman Hill inquired of the ARB members present as to whether there was any conflict of interest as defined by the Council's Statement of Organization and Procedures. Hill also made an inquiry into the

[7]No actions have ever been directed at Ve-Ri-Tas.

backgrounds of all panel members relative to possible bias or interest on the part of the ARB members toward the subject advertising.

On June 4, 1974, Hill sent a letter to Walker's announcing a referral to the ARB by the BBB of a complaint regarding Walker's advertising. This letter set forth the advertising being challenged, the names of the panel members, and advised Walker's that the procedures governing the ARB called for public disclosure of its decision with the relevant documents and data and informing the appropriate local and state governmental agencies of the panel's decision.

On June 10, 1974, C. G. Mendez, the Chairman of the ARB panel appointed to review the Walker case, sent Walker's a letter advising that a meeting would be

held on June 27, 1974, for a review of the advertising complaints, and inviting Walker's to appear to present evidence and its position.

Walker's counsel requested copies of all documents relative to ARB procedures, and the documents were given to him before June 24, 1974. On that day, Walker's counsel wrote to Hill raising procedural due process objections and denying that the ARB had any jurisdiction to consider any complaints against his client.

The panel did meet on the evening of June 27, 1974. There was no appearance by anyone representing Walker's. BBB representatives attended and presented materials which resulted in the panel's determination that certain Walker's ads were misleading. The condemned advertising practices included

the use of a testimonial made by the wife of the president of Walker's without disclosure of the husband/wife relationship; claims of weight reduction through the use of "passive exercise equipment"; and claims that no contracts involving binding obligations were involved without disclosure of the fact that the customer is required to prepay 25% of the cost of an extended program and that the prepayment is applied only to the last 25% of the prescribed number of treatments.

By letter dated June 30, 1974, Hill advised Walker's that the panel meeting had been held, and the specific charges and findings made were set forth in that letter. Hill requested that Walker's cease the use of the offending advertising within a reasonable time, and he asked to hear from Walker's within ten

days "regarding your 'acceptance, rejection or request for modification or reconsideration of the board's decision.'" There was no reply to that letter.

On July 16, 1974, Hill wrote another letter to Walker's to advise of the ARB's intention to make the findings public and to make the records available to appropriate local or state agencies. In that letter, he also said that, if Walker's submitted a concise statement of its view, the statement would be published and released simultaneously with the ARB release. Walker's did not avail itself of this opportunity.

On July 17, 1974, the date on which this action was commenced in the United States District Court, the petitioners moved for a temporary restraining order and preliminary injunction against any news release. That motion was denied

because it would have been a prior restraint of speech.

On September 12, 1974, Hill held a news conference at which he released the panel's findings and a statement that the ARB panel found Walker's advertising to be misleading or unethical.[8]

Immediately prior to the news conference, Hill wrote a letter to the Denver District Attorney's office, enclosing a copy of the panel's findings, and invited this agency to inspect the ARB files. Later, Hill addressed a letter to the Denver District Attorney demanding the filing of charges against Walker's. These were the only communications which the ARB had with governmental agencies concerning Walker's.

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[8]The Walker matter is the only one which has been the subject of the Council's entire procedural process.

E.

Filing of Charges by D.A.

The Metropolitan District Attorney's Consumer Affairs office in Denver, Colorado, through Suzanne Lynch, Deputy District Attorney in Denver, had previously instigated its own review of Walker's advertising in May or June of 1974, independent of the investigation then being conducted by the BBB. This investigation was prompted by the reading of one of Walker's ads by Lynch.

Following the September 12th press release by Hill, and the reading thereof by Lynch in a local newspaper, Lynch's representative visited the BBB office and was allowed to review Walker's information. Lynch herself never discussed the Walker's case with respondent Bell.

On October 14, 1974, the Denver District Attorney's office filed

misdemeanor charges against Walker's for violation of Colo. Rev. Stat. § 40-5-301, as amended, prohibiting false or misleading statements in advertising.

F.

Miscellaneous

The respondent organizations are private entities and the individual respondents are private individuals. None is alleged to have acted in anything but a private capacity. Respondents receive no government financing or other government assistance from the State of Colorado and are not government regulated.

Representatives of the Colorado Attorney General's office, the Denver District Attorney's office, and certain federal agencies, along with newspaper reporters and others, occasionally seek information from the BBB, and the BBB

makes the information available upon request. For the most part, the information compiled by the BBB which is made available to agencies in this fashion was prepared for its own purposes without instigation by any state agency. The purposes for which these agencies seek information maintained by the BBB are (1) to determine whether the subject of a consumer complaint has been the subject of other consumer complaints so as to call for further investigation and (2) to locate persons who had knowledge of the advertising practice in question and who could be sought as potential witnesses. These inquiries by state agencies are not made pursuant to any regular pattern.

The BBB is one of several private organizations from which such information is sought by the District Attorney's

office. The information is freely given. Otherwise, available subpoena powers could be exercised.

Occasionally, the BBB will assemble and submit to governmental agencies information concerning advertisers which it believes may warrant official legal action.

On several occasions BBB employees conducted investigatory shopping of certain Denver businesses at the request of one representative of the Colorado Attorney General's office in order to supplement previous BBB information, but petitioners were not involved.

The District Attorney's office has never requested the BBB to do any investigations, and no other governmental agency has done so.

The Colorado Attorney General's office has never investigated Walker's

and has never examined any of the BBB investigatory material concerning Walker's.

Prior to release of the panel's findings, there was no contact between respondents and the Colorado Attorney General's office or the Denver District Attorney's office concerning Walker's.

The flow of information is always from the BBB to a requesting agency. Neither the District Attorney's nor the Attorney General's office provides the BBB with information concerning advertisers or with any other information compiled during the course of investigations.

Other than the general endorsements set forth above, there never has been any participation of government officials or employees in the formation or activities of the Council or ARB, and no

governmental agencies have ever assisted the BBB in preparing cases submitted to the ARB.

The Metropolitan District Attorney's Consumer Affairs Office in Denver receives numerous complaints from consumers. It does not attempt to mediate disputes consumers and advertisers; rather, a large number of these complaints are determined not to involve criminal violations within a district attorney's jurisdiction, and the complainants are referred to other public and private agencies which may be available for assistance. These include the Consumer Protection Division of the Attorney General's office, the Motor Vehicle Division and other state regulatory agencies, the BBB's arbitration board, other private consumer-oriented organizations, and the Denver County

Court. The consumer makes the determination. The District Attorney's Office has never referred anyone to the Council or ARB, and the BBB is included as an alternative less than 10% of the time.

The District Attorney's office has never delegated any of its functions to any of the respondents, has never requested assistance from any of the respondents on matters being handled by it, and has never furnished respondents information pertaining to such matters.

The Colorado Attorney General's office does not refer complaints or complainants to the BBB.

The other respondent organizations and the other individual respondents, with the exception of Bell, have not had any contact whatsoever with state agencies.

The ARB has no subpoena powers; no authority to order anything or to enforce its findings; has never been requested by governmental authorities to perform investigations; has never received assistance of any kind from any governmental authority; imposes no legal sanctions; never represented that it had legal jurisdiction over Walker's or that Walker's was legally required to respond to the ARB; and had no contact whatsoever with Ve-Ri-Tas. No state agency has indicated that state authority was behind the ARB procedures; and no governmental agency has ever participated in any of the ARB activities.

Neither Ve-Ri-Tas nor Walker's was in the business of, nor derived revenue from, placing or producing advertising. Moreover, there is no allegation or showing in the record that the Council's

procedures, by design or effect, discriminate against advertisers which do not place or produce their advertising through ad agencies which are members of the respondent organizations.

Petitioners do not compete with any of the respondents or any members of the corporate respondents. The only suggestion by petitioners of competition with them is a vague reference to Gart Brothers Sporting Goods Company, of which respondent Gart is president, to the effect that Garts sells exercise and weight loss equipment in competition with petitioners. But Pat Walker testified that the machines of Ve-Ri-Tas are not sold to the public. Even assuming competition between Garts and the petitioners, there is no allegation or showing in the record that respondents' procedures were dictated by Gart or that

they were applied to petitioners for the purpose of eliminating competitors of Garts in the weight loss business.

No member of the media and no supplier or other business has refused to deal with Walker's or Ve-Ri-Tas.

Ve-Ri-Tas does not claim that the respondents interfered with its manufacture of machines, with its relationship with the advertising agency which produced all ads for Ve-Ri-Tas' salons, or with its lease operations, or that any of the respondents induced Walker's to breach any of the latter's agreements with Ve-Ri-Tas. The president of Ve-Ri-Tas testified that she did not know the nature of any injury to Ve-Ri-Tas or of any direct adverse effect on the trade or business of Ve-Ri-Tas.

Walker's does not claim to have been restrained by respondents in any

way in the placement of advertising; it does not claim to have been restrained in any way in the production of advertising (nor does it produce advertising); it does not claim to have been restrained in the mode and manner of advertising by the respondents; it does not claim to have been restrained in any way in purchasing space in The Denver Post and Rocky Mountain News, the major local newspapers; it does not claim to have been restrained in any way from receiving slicks and copies from Ve-Ri-Tas. Walker's never had any ads refused by any of the media nor any requests for modifications.

IV.

SUMMARY OF ARGUMENT

A. There is no symbiotic relationship between respondents and any state agency. The activities of the ARB are independent actions directed at advertisers suspected of false and misleading advertising. There is no state involvement in any of the respondents' activities.

B. There is no close nexus between respondents' activities and any state agency. The ARB has no enforcement powers and makes no binding determinations. Respondents simply exercise their right of assembly and right of free speech. They fulfill no public function.

C. Petitioners were afforded procedural due process. They were given notice of the hearing and the claims and were invited to participate. They declined to do so.

D. The trial court was without jurisdiction as to the Sherman Act claims, and Ve-Ri-Tas had no standing to sue.

E. There is no group boycott in the activities of the respondents. Respondents do not urge a boycott by anyone and are not engaged in competition with petitioners. Respondents have no anti-competitive motives. They simply disseminate their views with respect to false and misleading advertising.

F. Respondents do not compete with petitioners and have no anti-competitive motives or intent to monopolize with respect to petitioners. There has been no anti-competitive combination directed at petitioners.

G. There is no jurisdiction to grant private relief under the Commerce Clause.

V.

ARGUMENT

A.

Civil Rights Act

1.

Symbiotic Relationship

Petitioners argue that the lower courts have ignored the "symbiotic relationship" state action test established by the Court in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961) and cite Gilmore v. City of Montgomery, 417 U.S. 556, 94 S. Ct. 2416, 41 L.Ed.2d 304 (1974) and United States v. Price, 383 U.S. 787, 86 S. Ct. 1152 (1966).

The United States District Court for the District of Colorado and the Tenth Circuit Court of Appeals did not ignore the "symbiotic relationship" test. It simply does not apply to this

case, which is dramatically distinguishable on the facts from the above cases.

This Court in Burton, supra, characterized the relationship between the Wilmington Parking Authority, a public agency, and its private restaurant lessee, which admittedly was engaging in racial discrimination, as follows:

> The state has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

365 U.S. at 725, 81 S. Ct. at 862.

The relationship between the private restaurant and the state in Burton, in which this Court found the City of Wilmington and the restaurant to be in effect joint venturers in the restaurant's practice of excluding black patrons from a restaurant operated under

a leasing agreement in which the restaurant "operated as an integral part of a public building (owned by the city) devoted to a public parking service," is certainly not akin to the relationship in this case between the respondents and any law enforcement agency.

Moreover, this Court in Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974), in discussing Burton observed as follows at p. 358 of 419 U.S.:

> We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace', differences in circumstances beget differences in law, limiting the actual holding to lessees of public property.

In any event, there is no joint participation (or interdependence) of the defendants, or any one of them, with the activities of any state agency.

Rather, the contrary is the fact of the matter. The District Attorney's office had conducted its own independent investigation of the Walker advertising, and the filing of the criminal charges against Walker's was the result of this independent investigation. Indeed, the record does not disclose any request by the District Attorney's office to any of the respondents to do anything. Certainly there was no delegation of any of the District Attorney's authority, responsibility, or functions. See Williams v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L.Ed. 775 (1951); Gambino v. United States, 275 U.S. 310, 48 S. Ct. 137, 72 L.Ed. 293 (1927); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Cornfeld v. United States, 367 F.2d 1 (9th Cir. 1966). Cooperation and receipt of information

from the BBB (note that the flow of information is from the BBB; governmental agencies do not reciprocate, and the information is subject to subpoena in any event) do not constitute a delegation of authority or responsibility by a state agency.

The Gilmore and Price decisions are as far removed from the facts before this Court in this matter as those in Burton. Gilmore was another discrimination case involving the use of public park recreational facilities by private, segregated school groups and by other non-school groups which allegedly discriminated in their membership on the basis of race. As was noted at page 573 of 417 U.S. and page 2426 of 94 S. Ct. as follows:

> In contrast, here, as in Burton, the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities, and in whether that involvement makes the city 'a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment' . . . . Because the city makes city property available for use by private entities, this case is more like Burton than Moose Lodge. The question then is whether there is significant state involvement in the private discrimination alleged.

Price, of course, involved the question of whether or not certain criminal indictments stated a charge under the allegedly applicable civil rights statutes. As noted in Price, at page 795 of 383 U.S. and at page 1157 of 86 S. Ct.:

> In the present case, according to the indictment, the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design

> described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.

Given the facts of the above cases, and given the facts of this case, even if one accepts the petitioners' characterization thereof, is it any wonder that the courts below in applying the "symbiotic relationship" test reached a conclusion that state action was not involved in this matter? See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972); Ward v. St. Anthony Hospital, 476 F.2d 671, 675 (10th Cir. 1973); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

Ironically, petitioners argue that the respondents collectively have some sort of enforcement power somehow magically arising from their relationship with governmental agencies and ignore the fact that the activities of the respondents as directed at Walker's accomplished nothing. Walker's ignored the respondents' procedures and continued to advertise long after the cessation of the activities of the respondents.

2.

Public Function

Petitioners also argue a "public function" state action test and cite Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946), and Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed.2d 196 (1976). They argue that respondents have assumed governmental powers and exercise a uniquely governmental function by privately enforcing

federal, state and local criminal and civil laws. This is nonsense. The ARB clearly has no jurisdiction over anyone, and neither the ARB nor any of the respondents has any power to enforce views or to impose sanctions. It certainly does not purport or attempt to enforce any laws. Compare Ford v. Harris County Medical Society, 535 F.2d 321 (5th Cir. 1976) (no power to issue, suspend, revoke, or otherwise affect licensing of doctors) with Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L.Ed.2d 373 (1966) (private property used and maintained by city as municipal park), and Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809, 97 L.Ed. 1152 (1953) (de facto delegation of primary election process to private organization).

In Jackson v. Metropolitan Edison Company, supra, in which a heavily regulated utility with a partial monopoly terminated service of a customer who sought an injunction requiring continuance of electrical power to her residence until notice, a hearing, and an opportunity to pay the amounts due, this Court has rejected the broad proposition that all activities "affected with the public interest" involve the state, and declined to expand the "public function" doctrine. In Jackson, this Court enunciated the inquiry as follows:

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

419 U.S. at 351, 95 S. Ct. at 453. The public function doctrine was even further

limited in Hudgens v. NLRB, supra, holding no First Amendment right to enter a shopping center for the purpose of advertising a labor union strike in that there had been no dedication to public use.

Conceding that respondents attempted to act in the public interest, they make no binding determinations of anyone's rights and do not employ or purport to employ any of the powers used by the state to enforce such determinations; indeed they could not do so. The ARB simply exercises its right of free speech, which is not the sole domain of the petitioners whose advertising is the subject of the speech.

In short, there is no state involvement in respondents' activities and no close nexus therewith. To overcome this defect in their civil

rights claim, petitioners advance a novel theory. Stripped of rhetoric, petitioners' argument is that the respondents' self-regulatory mechanism is effective in bringing about voluntary correction of questioned advertising practices because their procedures prescribe the sanction of calling the ARB's findings concerning advertising practices to the attention of law enforcement authorities (in addition to the general public). Although apparently admitting that respondents do not and cannot influence the decision to institute criminal proceedings, petitioners argue that respondents' acts are "state action" because some people may believe that prosecution is likely to follow an adverse decision by the ARB. The same kind of effectiveness has been achieved by newspapers and other consumer oriented organizations which call the

attention of law enforcement authorities and the general public to shoddy and misleading business and advertising practices or provide information to law enforcement agencies. However, the effectiveness of otherwise private conduct is not determinative of whether state action is present. See Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948).

There has been no participation by the State of Colorado or any political subdivision, agent, employee, or municipality thereof, in the acts by which any of the respondents have allegedly deprived the petitioners of their civil rights. There was no involvement of the state in any form with the BBB's investigation of Walker's advertising or in the actions taken by the BBB or the ARB with respect thereto.

Suzanne H. Lynch, Deputy District Attorney assigned to the Metropolitan District Attorney's Consumer Affairs office, over and over emphasized and reemphasized in her deposition the concept that the Denver District Attorney's office in no way or manner utilized the BBB, the Council, the ARB, or any of the individual respondents to discharge any duties or responsibilities of the District Attorney's office.

Mrs. Lynch's testimony is emphatic and consistent. For example:

> Q (By Mr. Hertzberg) Do you know whether your office has ever requested the Better Business Bureau or any of its agents, servants or employees, to do any investigation on your behalf other than merely deliver files?
>
> A Never.
>
> Q Not to your knowledge?
>
> A To my knowledge, never.

* * *

Q (By Mr. Phillips) Have you ever asked any of those people or entities to perform any of your duties?

A Never.

Q To your knowledge, has the District Attorney's office ever asked those entities or individuals to perform duties of the District Attorney's office?

A Never.

Q Have you asked those individuals or entities to hold hearings with respect to Pat Walker's?

A Never.

Q With respect to Ve-Ri-Tas, Inc.?

A Never.

Q Did you ever direct any of these individuals or entities to investigate Pat Walker's?

A No.

Q To investigate Ve-Ri-Tas?

A No.

Q Have you ever asked anybody else to investigate Pat Walker's or Ve-Ri-Tas?

A Yes.

Q Outside your office?

A No.

* * *

Q [By Mr. Phillips] Have you ever commissioned the Better Business Bureau to arbitrate any matters which had come to your office?

A No.

* * *

Q (By Mr. Phillips) Did you ever provide any information to any of these defendants from your files with respect to Pat Walker's advertising?

A No, sir.

* * *

Q [By Mr. Phillips] Did your office provide the Advertising Review Board with any assistance whatsoever with respect to the matters which you read about in the newspapers?

A Not to my knowledge.

* * *

Q [By Mr. Phillips] Has your office ever provided any assistance or information to the Advertising Review Board with respect to any advertisers?

A Not to my knowledge.

Q Do you feel that any one or all of the defendants in this case have insinuated themselves into a position of interdependence so that they must be recognized as a joint participant in the activities of the District Attorney's office?

A No, sir.

* * *

Q [By Mr. Phillips] Does the Better Business Bureau systematically prepare and deliver to your office information that is gathered from investigations of businesses or what have you?

A To my knowledge, no.

Q Does the Better Business Bureau act as a screening service for your office?

A No, unfortunately.

Q Is any one or more of the defendants acting as agents of your office?

A None of them have ever acted as agents for our office.

* * *

Q [By Mr. Hertzberg] Your answers to Mr. Phillips, he asked you whether you would deliver or

transmit information in your files, statements in your files of witnesses, to anybody other than the defendant in this case; and you said you would not.

A I absolutely would not.

Q And as a matter or practice you don't do that?

A As a matter of practice we don't tell anybody what's in our files, Mr. Hertzberg.

Q It is confidential; is it not?

A Absolutely.

General endorsement of the Council's self-regulatory goals by the Colorado Attorney General's office and the Metropolitan Denver Consumer Affairs Office obviously does not rise to that level of state participation in the acts of the respondents directed toward the petitioners required to sustain a civil rights violation.

Petitioners rely on the case of American Mercury, Inc. v. Chase, 13 F.2d

224 (D. Mass. 1926). American Mercury has nothing to do with Section 1983. It was a suit by American Mercury, Inc., publisher of a magazine entitled American Mercury, to enjoin the defendant society's practice of notifying the plaintiffs' distributors that sale or distribution of the magazine would result in prosecution by the defendants. In practice, the society did initiate criminal complaints whenever such warnings were not heeded. The cases cited by the Court (at p. 225 of 13 F.2d) in support of the issuance of an injunction apply the common-law principle, analogous to the antitrust laws, that a combination of persons who conspire to destroy a plaintiff's business by bringing to bear on his customers threats of prosecution or other coercive means to cause them to refuse to deal with the plaintiff's product, is illegal,

regardless of defendant's motives. As stated by the Court at p. 225 of F.2d: "The principles of law involved . . . are analogous to those under which secondary boycotts are illegal . . . ."

In the case at hand, the respondents do not threaten to, and do not, initiate criminal prosecutions. They do communicate to subject advertisers that law enforcement authorities may be notified of their opinions concerning advertising claims, but such notification is directed only to the advertiser and not to any of his customers. Most importantly, in this case there has been no coerced boycott or refusal to deal with petitioners.

3.

Due Process

With respect to "procedural due process," respondents submit that under any standards the ARB procedures meet the

test. See Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L.Ed.2d 1307 (1960); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963), cert. denied, 375 U.S. 957, 84 S. Ct. 446, 11 L.Ed.2d 315 (1963); Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (D. Colo. 1966).

An examination of the ARB's "Statement of Organization and Procedures" reveals a determined effort by the ARC and ARB to discharge any duty or moral obligation of fairness to subject advertisers. An examination of the record will show that these procedures were followed in all material respects. Ten days' notice of the panel's meeting is required, and Walker's was given more than ten days' notice. A synopsis of the material to be presented to the panel was delivered to Walker's the day

before the hearing. The meeting was scheduled before an impartial panel before which Walker's and its counsel could have heard the evidence being presented, confronted witnesses, cross-examined parties appearing before the panel, introduced its own evidence, made arguments, and fully presented its side of the dispute.

As set forth by Judge Doyle in Sigma Chi Fraternity v. Regents of the University of Colorado, supra, an action for injunctive relief to prohibit the Regents from placing a fraternity on probation without procedural due process, at p. 528:

> The test as to whether a party has been afforded procedural due process is one of 'fundamental fairness' in the light of the total circumstances. It has been said that the due process clause of the Fifth Amendment does not guarantee any particular mode of procedure

> but that it does require adequate notice of opposing claims, reasonable opportunity to prepare and meet them in an orderly hearing adapted to the nature of the case and finally, a fair and impartial decision . . .
>
> The requirements of notice and of a fair and impartial hearing mean that the parties must be given a fair opportunity to present their positions . . . .

The Board's procedures are more than adequate under the foregoing tests. See Hannah v. Larche, supra; Garvey v. Freeman, supra.

Most importantly, petitioners did not avail themselves of the opportunity they were afforded by respondents' procedures to review the evidence against them, to participate in the hearing, and to formulate a public statement about the findings of the panel. As observed by the trial court at p. 1018 of 411 F. Supp: "Where, as

here, the plaintiffs have made no effort to use the processes available to them, they can hardly be claiming to be injured because not more was available."

The procedural and substantive processes afforded petitioners were more than adequate in view of the nature of the forum and the limited, noncriminal sanction (adverse publicity) involved. See Garvey v. Freeman, supra; Hyser v. Reed, supra.

B.

Sherman Act

With respect to the Sherman Act claims, respondents strenuously argue that there was no jurisdiction in the trial court below and that petitioner Ve-Ri-Tas had no standing to sue.

1.

Jurisdiction

Section 1 of the Sherman Act (15 U.S.C. § 1 (1974)) provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is illegal.

Section 2 of the Sherman Act (15 U.S.C. § 2 (1974)) condemns "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." (Emphasis added.)

As an element of jurisdiction, as well as of the offense, under both of these sections, the petitioners had to show that the alleged restraint of trade occurs in the flow of interstate commerce, or that the restraint has a

substantial effect on interstate commerce. Although Judge Matsch did not rule upon this point raised by respondents' motions, the record shows that the trial court did not have jurisdiction of the petitioners' claims under Sections 1 and 2 of the Sherman Act.

The restraint of trade, if any, involved in this case is placed upon the business conducted by Walker's,[9] which operates one figure perfection salon in Englewood, Colorado, and which competes in the reducing salon market in the Denver area. Walker's has enjoyed no out-of-state patronage (with the exception of a solitary customer), and its

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[9] A serious issue arises as to whether or not Ve-Ri-Tas even has standing to sue. See Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923, 91 S. Ct. 877, 28 L.Ed.2d 553 (1971).

business is obviously local in character. See Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); Page v. Work, 290 F.2d 323 (9th Cir. 1961); Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959); Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957); Spears Free Clinic and Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952); Kallen v. Nexus Corporation, 353 F. Supp. 33 (N.D. Ill. 1973); John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970), aff'd, 442 F.2d 1342 (9th Cir. 1971).

Walker's does receive advertising copy through channels of interstate commerce upon request although it pays no consideration therefor, and it

purchases space for such advertising copy in local newspapers, which are likewise distributed through channels of interstate commerce. However, if there is any "commerce" in advertising copy before it reaches Walker's in Denver, such flow of commerce ends at this point as Walker's is the ultimate consumer of the advertising copy. Walker's does not in any manner engage in the business of placing or producing advertising (nor does Ve-Ri-Tas). The subsequent local sale of advertising space by newspapers to Walker's and the subsequent inter-state sale of newspapers carrying the Walker's ads are severable transactions, and the latter commerce is not subject to, or in any way affected by, the alleged restraint. The alleged restraint does not occur "in the flow of" inter-state commerce. See Burke v. Ford, 377

F.2d 901 (10th Cir. 1967), rev'd on other grounds, 389 U.S. 320, 88 S. Ct. 443, 19 L.Ed.2d 554 (1968); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Bailey's Bakery Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964).

Although Walker's business may involve some interstate distribution by Ve-Ri-Tas of advertising materials, equipment, supplies, know-how and the like, all are purely incidental, not directly related to, and not the least bit affected by, respondents' activities. An incidental effect is quite clearly insufficient to confer jurisdiction, and here the effect is not even incidental. See Lieberthal v. North Country Lanes, supra; Page v. Work, supra; Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9th Cir. 1936).

Petitioners would predicate jurisdiction on the fact that in accordance with respondents' written Statement of Organization and Procedures the ARB may review complaints relating to "regional" as well as "local" advertisers; ergo, petitioners allege, respondents' activities are "not confined to the censorship of advertisements orginating in and intended solely for local markets." In other words, petitioners would predicate jurisdiction on the hypothetical effect of respondents' procedures on the trade conducted by unspecified merchants who do business in unspecified markets. The Court should note that the Walker's matter was the first and only matter ever considered by a panel of the ARB. That respondents' procedures may be applied to "regional advertisers" which engage in businesses unrelated to that

of petitioners does not afford a basis for jurisdiction of an alleged restraint of Walker's local figure perfection business. Obviously, the jurisdictional basis for the complaint must be factual and not hypothetical. To meet the jurisdictional requirements of the Sherman Act, plaintiffs must allege facts showing the precise manner in which the alleged restraint substantially affects interstate commerce. See United States v. Starlite Drive-In, 204 F.2d 419 (7th Cir. 1953). This the petitioners failed to do by way of pleading or otherwise.

2.

Fashion Originators' Guild

Petitioners' Section 1 argument rests on Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949

(1941).

Once again, the facts are dispositive of this issue. Fashion Originators' Guild involved a group boycott entered into for the purposes of eliminating competition by exertion of a concerted refusal to deal. Clearly, this is a per se violation of the Sherman Act, but in the case at hand there is no group boycott aspect to the activities of these respondents.

Fashion Originators' Guild involved a trade association of original dress designers and fabric pattern manufacturers which had endeavored to destroy competition from "style pirates" who copied designs and sold them at lower prices. This goal was accomplished pursuant to a conspiracy to boycott all retailers which purchased goods from the "pirate" manufacturers. The association

had set up an intricate trial and appellate process for determining which manufacturers had violated the agreement. It was not the procedures, however, that concerned this Court; it was the enforcement mechanism, i.e., the group boycott, which the Court found to be a per se violation.

By no stretch of the imagination is the September 12, 1974, press release of the respondents herein the equivalent of the group boycott in the foregoing case. Compare Radiant Burners, Inc. v. People's Gas, Light and Coke Co., 364 U.S. 656, 81 S. Ct. 365, 52 L.Ed.2d 358 (1961) and Eastern States Lumber Dealers Association v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490 (1914).

In the case of Sugar Institute v. United States, 297 U.S. 553, 56 S. Ct. 629, 80 L.Ed. 859 (1936), this Court issued its important dictum to the

effect that reasonable "self-regulation" by trade associations does not violate the antitrust laws (where no boycott or other per se violation is involved) when such practices are designed to mitigate recognized evils in a trade. As stated by this Court in 297 U.S. at 597-598:

> Designed to frustrate unreasonable restraints, they [the antitrust laws] do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils, which are infractions of positive law. Nor does the fact that correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly, we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is

> not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities . . . Further, the dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful.

(Emphasis added.)

Although the foregoing language was written with respect to an alleged price fixing conspiracy involving circulation of pricing information, it has obvious applicability to the present case. The mere dissemination of information critical to petitioners' advertising is

not a violation of the antitrust laws. Rather, the right to disseminate such information is essential to a free and open market and is protected by the First Amendment. If the antitrust laws were to be read so broadly as to preclude fair comment on the content of advertising material, they would infringe upon the respondents' First Amendment rights. See United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961).

The present case is quite comparable to McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir. 1939), an action under the antitrust laws in which the plaintiff claimed that the New York Stock Exchange and the New York Better

Business Bureau had conspired to drive him out of business by publishing "letters and leaflets that he was a person unreliable morally and financially, with a record of criminal convictions." There, Judge Learned Hand said, at p. 912 of 107 F.2d, as follows:

> Moreover, if what the Bureau did say about he plaintiff was true, it was not guilty anyway, not because truth is a defense in such actions, but because in this particular case there was no other evidence to support a verdict. To be actionable the combination or agreement must be unlawful in means, or in end; the only unlawful means possible were the utterances about the plaintiff, the truth of which the judge did leave to the jury. The end avowed -- ridding the business of unscrupulous persons -- was not only lawful, but commendable, and while the defendants may have had other motives, that had to be proved and could not be assumed. To spread abroad what it had learned did not tend to show that its true purpose was not what it avowed, if the facts were so; indeed the Bureau would have been recreant to its duty, if it had suppressed the information, which, prima facie at least, showed the plaintiff to be unfit for business.

And, as Judge Matsch found in the instant case, at p. 1019 of 411 F. Supp.:

> There is no proof of such other motive in this case. Indeed, in my view the Pat Walker advertising was misleading because of its failure to tell the whole truth. The discovery record supports the characterizations and conclusions made by the defendants.

In this case there is nothing in the record indicating a conspiracy or conduct calculated either to exclude the petitioners from any market or to accomplish any other anti-competitive objective. There has been no conspiracy and no attempt by respondents or any of them to persuade anyone to refuse to deal with Walker's (or Ve-Ri-Tas); and there has been no refusal to transact business with petitioners by customers, the media, advertising agencies, suppliers, or others dealing with petitioners. There is nothing even suggesting that the Fashion Originators' Guild case, which

involved a group refusal to deal, applies to the facts in this case.

Petitioners argue that the respondents' attempts to eliminate deceptive advertising practices and their conduct in issuing public statements concerning advertisements are calculated to cause members of the public to boycott Walker's. However, the content of the respondents' press release and the accompanying statement make it clear that respondents, and particularly the ARB, which issued the press release, did nothing more than objectively detail to the public their findings concerning Walker's advertising. Absent an anti-competitive motive, which is absent in this case, reasonable activities are not actionable under the Sherman Act even though their incidental effect may be to cause Walker's a loss of patronage. See Bridge Corporation of

America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970), cert. denied, 401 U.S. 940, 91 S. Ct. 940, 28 L.Ed.2d 220 (1971) (indirect effect on bridge competition); Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S. Ct. 752, 24 L.Ed.2d 755 (1970) (no anti-competitive motive or causation).

Petitioners repeatedly refer to the treatment of nonmembers by the BBB. The significance is unclear. The BBB is not an organization of competitors, or persons interested in any particular line of trade, but is made up of myriad and unrelated types of businesses. Moreover, there is not the slightest indication in the record that the disparity in treatment, if any, is based on any anti-competitive purpose, or, for that matter,

that there is any resulting anti-competitive effect. See Deesen v. Professional Golfers' Association of America, 358 F.2d 165 (9th Cir. 1966), cert. denied, 385 U.S. 846, 87 S. Ct. 74, 17 L.Ed.2d 76 (1967); Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963) (publication of truthful reports of financial difficulties no way indicative of conspiracy).

3.

Section 2

Petitioners' Section 2 claim boils down to an assertion that substantially all of the members of the Ad Club, and a limited number of the members of the other respondent organizations, consists of most, if not all, of the advertising producers in the Denver metropolitan area.

Mere collective strength in the advertising production market, however, does not establish the offense of

monopolization. There is no allegation or indication in the record that the respondents, by the alleged combination, discriminate in any way against nonmember producers of advertising copy or out-of-state producers of advertising copy in any way, or that the alleged combination is calculated or intended to eliminate competition in the advertising production business. Petitioners' claim under Section 2 fails as a matter of law. See Deesen v. Professional Golfers Association of America, supra; District of Columbia Citizen Publishing Co. v. Merchants Manufacturing Co., 83 F. Supp. 994 (D.D.C. 1949).

Petitioners also stress that membership of the respondent organizations, consisting of a cross-section of Denver businesses, includes sporting goods stores which sell exercising equipment,

and physicians and drug stores, which dispense diet pills. These concerns, petitioners contend, would have an "interest" in eliminating Walker's, which offers reducing services, from the Denver market. Accepting this very tenuous proposition as true, petitioners nevertheless do not allege or show that the instigation or outcome of the proceedings against Walker's were in any way dictated by businesses which compete with either of the petitioners. The fact that a handful of the members of the respondent organizations may be indirect competitors of the petitioners is not an antitrust violation, absent a conspiracy on the part of such persons to eliminate their competitors from the market and to use the respondents' procedures to do so. No such anti-competitive combination has been alleged

or shown by the petitioners. See Roofire Alarm Co. v. Royal Indemnity Company, 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir. 1963).

C.

Commerce Clause

See opinion below at 411 F. Supp. 1012, 1019 (D. Colo. 1976).

VI.

CONCLUSION

None of the considerations set forth in this Court's Rule 19 have been met. No new important question of federal law arises, and the Tenth Circuit has not decided any federal questions in any way conflicting with applicable decisions of this Court. Rather, the facts simply do not support petitioners' strained interpretations

and efforts to apply various standards and tests to respondents' activities.

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CERTIFICATE OF SERVCICE

I do hereby certify that I am counsel for the Respondents, a member of the bar of the Supreme Court of the United States, and that I have this 27 day of April, 1978, served the foregoing Brief of Respondents by depositing copies thereof in the U.S. Mail, at Denver, Colorado, air mail, postage prepaid, addressed to counsel for Petitioners, as follows:

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